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IN THE

Supreme Court of the United States

OCTOBER TERM, 1903.

No. 81.

Office Supreme Court U.S.
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Clerk.

HARRY B. SMITH, AUDITOR OF MARION COUNTY, INDIANA,
Plaintiff in Error,

v.

THE STATE OF INDIANA, ON THE RELATION OF MARTHA LEWIS AND BENJAMIN LEWIS,
Defendant in Error.

No. 18,600.

IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

Brief of Plaintiff in Error.

ROSCOE O. HAWKINS,
HORACE E. SMITH,
October 25, 1903.

WM. B. BURFORD, PRINTER, INDIANAPOLIS

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I.

STATEMENT OF CASE.

The General Assembly of the State of Indiana which met in 1899, passed what has since been commonly styled "The Mortgage Exemption Law." It went into force and effect on March 4, 1899. The law is short, and is hereinafter set out in full.

This action was begun by the relators in the Marion Circuit Court by filing an application "for a writ of mandate and prohibition," whatever that may be, to compel Harry B. Smith, as the Auditor of said county, to certify and allow as "exempt from taxation," so much of the assessed value of a certain piece of real estate as the relators claim should have been exempted under the said Act of 1899, by reason of the existence of a certain mortgage alleged to be upon the said realty, a copy of which is set out in the transcript (pp. 5-6).

The deed of the relators is set out in the affidavit upon which the writ was issued, and, as appears from the record, was never recorded, so that the Auditor had no record evidence of the ownership of the realty beyond the affidavit of the relator making the affidavit.

The mortgage is also set out in the transcript (pp. 4-5) and shows that it was given to secure eight notes of fifty dollars ($50) each, the first payable January 21, 1898, and one each year thereafter on the same date, so that, according to its terms, at least four of the notes, or two hundred dollars ($200) of the principal and the annual interest on all the notes, should, if the terms of the mortgage had been complied with, have been paid at the date of the filing of the affidavit and the bringing of the action.

The affidavit alleged to have been filed with the Auditor is part of the record. (Transcript, pp. 5-6.) It shows that Martha Lewis made oath that she was the owner of the described real estate; not that it was owned by herself and her husband, as tenants by entirety, as shown by the deed

itself; that the mortgage indebtedness was four hundred and fifty dollars ($450), while the mortgage itself showed only four hundred dollars ($400); the first and second descriptions in the affidavit were not alike; the first was clearly bad; the year for which exemption was claimed was omitted, or else must read, "190—," and nothing is stated as to any assignee of the mortgage, or his residence.

The petition herein claims "about $500" exemption, instead of four hundred and fifty dollars ($450), which it was alleged was the mortgage debt, and that "so much of their property is exempt from taxation."

The writ was an alternative writ, and alleged, as set forth therein, that the relators had complied with all the preliminary steps necessary to entitle them to the benefits of the deductions provided for in the said Act, but that the defendant, Harry B. Smith, as Auditor of Marion County, was refusing to allow them the deduction of five hundred dollars ($500) from the assessed value of their realty, as provided by the said Act of March 4, 1899, and demanded that the court, by its writ of mandate, require the Auditor to make the deduction on account of the mortgage indebtedness upon the said realty, as shown by the said affidavit, and as provided for in the said Act.

The alternative writ issued, and to it the defendant, Harry B. Smith, Auditor, on May 27, 1901, filed a demurrer. (Transcript, pp. 8-9.)

The case grew beyond the original intent. There was abundance of reason for refusing to allow the exemption demanded and claimed, by reason of the irregularities

above set forth in the affidavit and proceedings to obtain the alleged exemption, and because the same did not comply with the provisions of Section 2 of the Act, which prescribed what must be done by the applicant for exemption to obtain it. The constitutionality of the law becoming generally discussed all over the State, the Attorney-General entered an appearance in this cause in the lower court, all technical objections to the writ and affidavit were waived, and the constitutionality of the law, waiving questions of form, became, was and is the only question discussed in the record.

The demurrer was orally argued by counsel, and on June 12, 1901, the Judge of the Circuit Court of Marion County, Indiana, sustained it (transcript, p. 9), and held the act unconstitutional.

The relators declined to plead further, elected to stand on the complaint, and the court entered judgment. (Transcript, p. 9.)

From this judgment appeal was taken to the Supreme Court of the State of Indiana. The only error assigned was the ruling of the court on the demurrer. In the Supreme Court the case was briefed carefully, on both sides, and on February 28, 1902, the Supreme Court reversed the ruling of the Marion Circuit Court, three of the five Judges of the Supreme Court holding that the ruling of the Marion Circuit Court was erroneous and two dissenting, and thus the constitutionality of the Act was declared by a divided court, a three to two decision, and the cause was sent back to the Marion Circuit Court with instruc-

tions to reverse its ruling on the demurrer and overrule the same. (Transcript, pp. 9-10.)

Both the majority and minority opinions, and the opinion on the petition for rehearing, are made part of the transcript. (pp. 11-35.)

Thereafter, on May 24, 1902, in accordance with the instructions of the Supreme Court, the cause was redocketed in the Marion Circuit Court and the demurrer to the alternative writ was overruled, and the opinion of the Supreme Court was spread of record. (Transcript, p. 10.)

Thereafter, on May 31, 1902, Harry B. Smith, Auditor, plaintiff in error, filed two paragraphs of return to the writ; the first alleging the unconstitutionality of the Act under the State Constitution; the second alleging its unconstitutionality under the Constitution of the United States. (Transcript, pp. 36-41.) The answer sets out the Act in full. (Transcript, pp. 36-37, 38-39.)

To each of the answers or returns the relators demurred for want of facts (transcript, p. 41), and thereafter, on June 6, 1902, the Marion Circuit Court sustained the separate demurrers of the relators to each paragraph of answer. (Transcript, p. 42.)

The defendant thereupon elected to stand by his return as made, declined to make further return or answer further, and, thereupon, the court entered judgment for the relators. (Transcript, p. 42.)

This judgment the defendant, Harry B. Smith, Auditor, appealed to the Supreme Court of the State of Indiana (transcript, pp. 42-44) and such proceedings were had in

the said cause in the Supreme Court, that on June 27, 1902, the rulings and judgment of the Marion Circuit Court were affirmed by the final judgment of the Supreme Court of the State of Indiana, three of the five Judges of the said court joining in the affirmative opinion, and two again dissenting therefrom, as before. (Transcript, pp. 45-46.)

From this judgment a writ of error was taken to this court, where the whole question is again submitted for decision.

II.

HISTORY OF THE LAW IN INDIANA.

The so-called mortgage exemption law of Indiana has had a stormy existence. It was first introduced in the session of the Legislature of 1899. It was born in the heat of politics, and was always a political factor. It was much debated during the session, and its constitutionality was always questioned. It was hotly opposed by the best lawyers in both Senate and House of Representatives, but finally passed in the form in which it now appears in this cause by a narrow majority.

It went to the Governor, who had so much doubt as to its constitutionality that he declined to approve and sign it, but did suffer it to become a law without his signature. It went into force March 4, 1899. Its constitutionality was questioned all over the State. Attorneys gave opinions against it; county courts held it valid; others held it invalid. In many counties the officials, under the advice of their several county attorneys, attempted to enforce and carry out its provisions. In as many or more other counties it was pronounced unconstitutional and no effort was made to enforce its provisions. It was constantly a question for debate, and always on political grounds. It was called the "poor man's law," and every effort was made to bring it into favor. The legal profession generally pronounced it unconstitutional and vicious in its effect and results. So it has proven. In Marion County, where this case arose, the officials sought honestly to enforce it. The

result was instantly apparent. The tax rate rose steadily from $1.65 on the hundred dollars to $2.08, and the end is not yet.

The effect of the law became so pronounced, and it so affected the gross amount of taxes collected in this county, that a strict compliance with the provisions of the law began to be applied to the affidavits which were a prerequisite to the allowance of the exemption. Out of the refusal to allow an exemption on an alleged faulty affidavit this case grew. It grew beyond its original intent, and once being brought into court the faulty features of the affidavit were lost sight of, and all defenses except the unconstitutionality of the law were waived and this question, as the record shows, was the only one considered by the Circuit Court.

Marion County has most generally been blessed with talented judges. Being the center of the great business interests of the State, its bench has not been excelled in legal acumen and ability even by the Judges of the Supreme Court of the State. Judge Henry Clay Allen, of the Circuit Court, who decided this question, is no exception to the rule; he is an able and erudite lawyer. As such, he considered this case.

Soon after the inception of the case the Attorney-General, on account of the confusion which had ensued all over the State as to the enforcement of this law, appeared in the case. It was ably argued and debated from all points, and thereafter Judge Allen, after much deliberation and study, pronounced the law unconstitutional.

Appeal followed. It was exhaustively briefed and argued. The controversy continued. The Supreme Court divided upon it finally; three for the law and two against it.

The net result, disregarding rank of the judges, is that three judges have pronounced the law unconstitutional, and three as strenuously insist that it is constitutional. Therefore, we come to your Honors that we may know the law.

III.

ARGUMENT.

1. THE LAW.

There are two answers in this case; one setting up that the law in question herein is in conflict with the equality clause of the Fourteenth Amendment to the Constitution of the United States; the other setting up that the law is in conflict with a like provision of the Constitution of the State of Indiana.

The Constitution of the United States guarantees to each and every citizen the equal protection of the laws, and prohibits any State from making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States, or which deprives them of life, liberty or property, without due process of law, or which denies to any citizen within its jurisdiction the equal protection of the law.

Fourteenth Amendment U. S. Constitution.

This provision of the Constitution applies to and covers all questions of unequal taxation.

Railroad Tax Cases, 13 Fed. Rep. 722 (732 et seq.);

Nashville, etc., Ry. v. Taylor, 86 Fed. Rep. 168 (179 et seq.);

Railroad and Telephone Cos. v. Board, 85 Fed. Rep. 302 (303, 317 et seq.);

Fraser v. McConway, 82 Fed. Rep. 257 (259-260);

Devenport v. Cloverport, 72 Fed. Rep. 689 (693-694);
Myers v. Shields, 61 Fed. Rep. 713.

It will be sufficient for us to quote a short extract from the Railroad Tax Cases, to show how clearly the courts have settled this question. We quote from page 733:

> "The Fourteenth Amendment to the Constitution, in declaring that no State shall deny to any person within its jurisdiction the equal protection of the laws, imposes a limitation upon the exercise of all the powers of the State which can touch the individual or his property, including among them that of taxation. Whatever the State may do, it can not deprive any one within its jurisdiction of the equal protection of the laws. And by equal protection of the laws is meant equal security under them to every one on similar terms—in his life, his liberty, his property, and in the pursuit of happiness. It not only implies the right of each to resort, on the same terms with others, to the courts of the country for the security of his person and property, the prevention and redress of wrongs and the enforcement of contracts, but also his exemption from any greater burdens or charges than such as are equally imposed upon all others under like circumstances.
>
> "Unequal exactions in every form, or under any pretense, are absolutely forbidden; and of course unequal taxation, for it is in that form that oppressive burdens are usually laid. It is not possible to conceive of equal protection under any system of laws where arbitrary and unequal taxation is permissible."

The above quotation, and the cases cited, show clearly a federal question in this cause.

The State Constitution of Indiana as clearly prohibits unequal taxation as does the Constitution of the United States. Therefore, when we discuss one answer in this cause we discuss both.

The Indiana State Constitution provides, in the Bill of Rights constituting the first Article thereof, that:

"ARTICLE 1.—BILL OF RIGHTS.

"68. (68.) Privileges Equal.—23. The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens.

"ARTICLE 4.—LEGISLATIVE.

"118. (118.) Local Laws Forbidden.—22. The General Assembly shall not pass local or special laws in any of the following enumerated cases, that is to say:

* * * * * *

"For the assessment and collection of taxes for State, county, township, or road purposes;

"119. (119.) Laws Must be General.—23. In all the cases enumerated in the preceding section, and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the State.

"ARTICLE 10.—FINANCE.

"193. (193.) Assessment and Taxation.—1. The General Assembly shall provide, by law, for a uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting such only, for municipal, educational, literary, scientific, religious, or charitable purposes, as may be especially exempted by law."

The laws require, therefore,

1. That the General Assembly shall provide a law for assessment and taxation;

2. That the law must provide for a uniform and equal rate of assessment and taxation;

3. That such law shall prescribe such regulations as shall secure a just valuation, for taxation, for all property, both real and personal;

4. Excepting such only for

(a) Municipal,
(b) Educational,
(c) Literary,
(d) Scientific,
(e) Religious, or
(f) Charitable purposes

as may be exempted by law.

This leads us at once to inquire the purpose of such a provision in the Constitution of the State, and of the prohibition in the Fourteenth Amendment of the Constitution

of the United States. Why were they enacted? What conditions were they intended to correct and reform? And, at the very threshold of the investigation, we find that in the absence of constitutional restriction the power of the Legislature to exempt classes of property is unquestionable and absolute.

25 Am. & Eng. Enc. Law, p. 156;
Indianapolis v. Sturdevant, 24 Ind. 391;
Trustees M. E. Church v. Ellis, 38 Ind. 3 (7).

Thus, the man with influence in Congress or in the Legislature was able to procure laws that gave distinct advantage to persons and classes of property. This evil the Constitutional Convention of Indiana sought to remedy, and in its wisdom formulated the foregoing constitutional provision. The limitations and restrictions contained in it are marked, and will be effective if adhered to, but departure from the strict rule means confusion. Under this constitutional provision the Legislature must pass a law providing for "a uniform and equal rate of assessment and taxation," embodying in it such regulations as "shall secure a just valuation for taxation, of all property, both real and personal," * * * "excepting" certain enumerated classes of property therein named.

It will be noticed that this section relating to taxation divides itself into two distinct parts, separated by a semicolon, and each part of the section relates to a different proposition. The first one fixes the general right of the Legislature, and provides that it shall pass a law, and

that it shall provide for a uniform and equal rate of assessment. The second part of the section relates purely to the question of securing a just valuation of property. Thus, the two things which are important in a law relating to taxation are provided for: first, the law and the rate; and second, the just valuation of the property.

It must be borne in mind that neither of these has aught to do with the other. One rests entirely within the province of the General Assembly, viz.: that part of the law which provides that it shall pass and provide a law which shall fix a uniform rate. The second part of the section requires only that it shall, in some way, provide the necessary machinery to make a just valuation of the property, to which the uniform rate provided for in the first part of the section shall be applied. We shall call attention to this peculiarity in this section later in this argument.

The provision that "all property, both real and personal," shall be taxed, precludes exemption by the Legislature of any property from taxation.

25 Am. & Eng. Enc. Law, p. 156, note;
Memphis, etc., Ry. Co. v. Gaines, 97 U. S. 697;
Trustees M. E. Church v. Ellis, 38 Ind. 3 (7);
Memphis, etc., Ry. Co. v. Gaines, 3 Tenn. Ch. 604;
Ellis v. Louisville Ry. Co., 8 Baxt. (Tenn.) 530;
State v. Hannibal, etc., Ry., 75 Mo. 208;

New Orleans v. Lafayette Ins. Co., 28 La. An. 756;
Chattanooga v. Nashville, etc., Ry. Co., Lea (Tenn.) 651.

But, on the other hand, if the constitutional provision by its terms permits exemption, then, within the limits of its provisions, exemptions may be made by law, by the Legislature, but no exemption can be made outside of the limits specified.

State, ex rel. Tieman, v. Indianapolis, 69 Ind. 375 (376-7);
Chesapeake, etc., Ry. Co. v. Miller, 19 W. Va. 408;
Hogg v. Mackey, 23 Ore. 339; 31 Pac. R. 779; 19 L. R. A. 77.

It is plainly apparent from the reading of the exceptions enumerated in the above section, that this law or Act does not come under any of the exceptions of the statute. As no such claim has ever been made in any of the discussions relating to it, we do not stop to discuss this question further.

It is further true that any law exempting either persons or property from taxation must be strictly construed, and it has been settled that the provision under discussion (Article X, Section 1) must be so construed.

Trustees M. E. Church v. Ellis, 38 Ind. 3 (8);
Read v. Yeager, 104 Ind. 195 (200);
Conklin v. Cambridge, 58 Ind. 130;

City of South Bend v. University, 69 Ind. 344.
State, ex rel., v. City of Indianapolis, 69 Ind. 375;
Warner v. Curran, 75 Ind. 309;
Orr v. Baker, 4 Ind. 86;
Indianapolis v. McLean, 8 Ind. 328;
Indianapolis v. Grand Lodge, 25 Ind. 518 (521);
25 Am. & Eng. Enc. Law, p. 157.

The burden is also on him who claims the exemption to show that his case falls clearly within the law.

25 Am. & Eng. Enc. Law, p. 159.

But not only is the burden on him who claims the exemption, but his pleading must set out the facts that exempt him.

Cairo, etc., Ry. Co. v. Parks, 32 Ark. 131;
Appeal Tax Cases v. Rice, 50 Md. 302 (312-3).

And the test in every instance of exemption, as to whether it is within the limits of the constitutional provision, is the use.

Travelers Ins. Co. v. Kent, 151 Ind. 349 (353);
State, ex rel. Tieman, v. Indianapolis, 69 Ind. 375 (378);
25 Am. & Eng. Enc. Law, pp. 166, note, 167-8.

And the exemption never applies to an individual owner, but always to the public character and use of the exempted property.

> Travelers Ins. Co. v. Kent, 151 Ind. 346 (353-4).

And we might add, just here, that nearly all the cases cited by the learned Attorney-General and his eminent co-counsel, in their briefs filed in this action, relate only to specific cases where the parties are seeking to show that they come within some of the exemptions of the statute, and only a very limited number of them discuss or have any constitutional question in them.

2. THE ACT.

> **"AN ACT concerning the taxation of real estate encumbered by mortgage, and declaring an emergency.**
>
> [S. 17. LAW WITHOUT GOVERNOR'S SIGNATURE MARCH 4, 1899.]
>
> "Section 1. Be it enacted by the General Assembly of the State of Indiana, That any person being the owner of real estate liable for taxation within the State of Indiana, and being indebted in any sum, secured by mortgage upon real estate, may have the amount of such mortgage indebtedness, not exceeding seven hundred dollars, existing and unpaid upon the first day of April of any year, deducted from the assessed valuation of mortgage premises for that year, and the amount of such valuation remaining after such deduction shall have been made shall form the basis for assessment and taxation for said real estate for said year:

Provided, That no deducton shall be allowed greater than one-half of such assessed valuation of said real estate.

"Sec. 2. Any person desiring to avail himself, or herself, of the provisions of this act shall, between the first day of March and the first day of May of each year, file with the Auditor of the county wherein said real estate is situate, a sworn statement of the amount of such mortgage indebtedness existing and unpaid on the first day of March of that year, giving the name and residence of the mortgagee, and shall also give the name and residence of the assignee or bona fide owner or holder of said mortgage, if known, and if not known, said person shall state that fact, and shall also state the record and page where said mortgage is recorded, and a brief description of the real estate upon which such incumbrance exists.

"Sec. 3. The County Auditor with whom such statement is filed, in case the money, notes or credits evidenced by such mortgage indebtedness be liable for taxation in any county in the State of Indiana other than the one wherein such real estate is situate, shall immediately certify and transmit a copy of such sworn statement to the Auditor of the county wherein the mortgagee, assignee or bona fide holder or owner of said mortgage resides, or wherein the money, notes or credits evidenced by such mortgage is otherwise taxable.

"Sec. 4. Any person who shall willfully make a false statement of the facts provided for in Section 2 of this Act, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than fifty, nor more than

five hundred dollars, to which may be added imprisonment in the county jail for any term not exceeding six months.

"Sec. 5. Whereas, an emergency exists for an immediate taking effect of this act, the same shall be in force from and after its passage."

Acts 1899, p. 422;
Burns Rev. Stats. 1901, Secs. 8417 et seq.

The Act being short we have set it out in full. Having in mind, then, the provisions of our Constitution, and the well settled rules of law hereinbefore set out, let us now examine it critically, and we feel sure that the court will at once perceive its unconstitutional features. It is in five sections. The fourth section, a penal provision against false statement, and the fifth section, the emergency clause, cut no figure in this case, and we shall drop them from any discussion.

Section 1 shows to whom the law applies, and provides:

1. "That any person

(a) Being the owner of real estate liable for taxation within the State of Indiana,

(b) And being indebted in any sum secured by mortgage upon real estate,

may have the amount of such mortgage indebtedness,

(c) Not exceeding seven hundred dollars ($700),

(d) Existing and unpaid upon the first day of April of any year,

deducted from the assessed valuation of the mortgaged premises for that year;"

2. "And the amount of such valuation remaining after such deduction shall have been made, shall form the basis for assessment and taxation for said real estate for said year."

"3. Provided, No deduction shall be allowed greater than one-half of such assessed valuation of said real estate."

The court will see, instantly, that the very first clause of the first sentence of the law creates a class, viz.: "Persons owning real estate liable for taxation in this State," which, of course, excludes from the provisions of the law to follow:

(a) All persons who do not own real estate in the State;

(b) All persons owning real estate in the State which is not liable for taxation.

In other words, this clause excludes, as an examination of any tax duplicate will show, more than half the taxpayers from the provisions of the law about to be enacted.

The next clause of the same sentence, however, makes still further limitations, and restricts the operation of the law about to follow to those of the above class who

(c) Are indebted in any sum secured by mortgage upon real estate,

thus again restricting the operation of the law to a much smaller class, to wit: those owning real estate who are "indebted in any sum secured by mortgage," and, so far as the provision of the law is concerned, the indebtedness

secured by mortgage is not limited to the real estate in the county, or even in the State, nor to the particular property mortgaged. It may be anywhere.

Thus there is excluded from the operation of the law all owners of real estate whose realty is unincumbered by mortgage, whether because the credit of the excluded persons is such that a mortgage is not exacted of them, or their honesty is so unquestioned that belief in their intention and ability to pay induces the creditor not to exact mortgage security, persons certainly equally worthy of the benefits of the law, but who by its provisions are excluded from it; thus at once violating the above constitutional provision for "uniform and equal rate of assessment and taxation," and thereby prescribing a "regulation" which even its most zealous advocates can not claim "secures a just valuation for taxation of all property, both real and personal."

Neither will it do to answer that the classes excluded by this law have the right to deduct their indebtedness under other provisions of the laws from credits, since the provisions of those other laws, if any there be, must be equally applicable to those persons within the purview of this law, as well as to those excluded from it. This conclusively shows that the law is drawn to give an undue advantage to the mortgage debtor over others.

Further, the amount to be deducted is not the amount of the mortgage debt, but an amount "not exceeding seven hundred dollars." It is a gross deduction, not fixed by any rate nor having any uniformity. It is an arbitrary pro-

vision and amount; one that in the very nature of the case is fixed arbitrarily and without law therefor, and in equal measure, even among those persons coming within the purview of the law, violates the constitutional provisions for "uniform and equal rate of assessment and taxation."

Again, the indebtedness that may be deducted is only the indebtedness "existing and unpaid upon the first day of April of any year," thus, without reference to rate, or uniformity, or any existing equities, excluding all debts that may have existed during the entire tax year, but which fell due and were paid on March 31st, or immediately preceding days, notwithstanding the fact that the tax payment is always a year behind, and the debt had an actual existence during the entire tax year. This, again, is arbitrary, without any ratable feature or uniformity in it, and a clear violation of the constitutional provision under discussion.

A most happy illustration of the inequalities of this law in its application is made by Judge Dowling in his dissenting opinion, which appears in the record (pp. 25-26).

Again, the law provides, in the second clause of this section, that, after deducting the arbitrarily fixed sum of seven hundred dollars, or "one-half of such assessed valuation of said real estate," as the case may be, "the amount of such valuation remaining after such deduction shall have been made, shall form the basis for assessment and taxation for said year." Thus fixing a basis of valuation for assessment arbitrarily, and not by a law with a provision for "a uniform and equal rate of assessment and

taxation," but by a law which arbitrarily fixes an amount, without any ratable provision, and which provides that the arbitrary amount or valuation thus obtained after such seven hundred dollars deduction, shall form the basis for assessment. This fixes the amount of the assessment arbitrarily, and not by any ratable rule, nor with any uniformity.

Again, the proviso says that "no deduction shall be allowed greater than one-half of such assessed valuation of said real estate," the "such assessed valuation" meaning, clearly, the arbitrary fixed valuation which is reached after deducting the arbitrary sum of seven hundred dollars, or "one-half the assessed valuation," from the appraised value of the realty. This, again, clearly violates the constitutional provision "for a uniform and equal rate of assessment and taxation," and fixes the value for assessment arbitrarily, by making the value for assessment the amount reached by a process of subtraction of an arbitrary amount, instead of an assessment based on the appraisement and valuation of the realty. The deduction is inevitable. The law must be unconstitutional. It can not be otherwise, it seems to us, by any process of reasoning.

This process of fixing the valuation of realty also ignores all laws for assessment. We have by law, in Indiana, the office of Assessor, and his duties are laid down in the written law. He is given the power and the authority, by law, to assess realty, and no other officer has it. After his work is done and reported to the Auditor, to calculate the tax upon the property at the rates fixed as pro-

vided by law, this arbitrary deduction must be made by the Auditor, in the event of the filing of the necessary affidavit by the owner of the mortgaged property, and the arbitrary amount provided by this law deducted from the Assessor's valuation, and the Act then provides that the "amount thus obtained after making the deduction of the said seven hundred dollars," or whatever the amount may be, "shall form the basis for assessment." The result of this provision, of course, is to set aside the entire work of the Assessor, who had, by law, up to that time fixed the assessment of the property on the basis of the value thereof.

Section 2. This section is the one providing what the one wishing to avail himself of the provisions of this law must do to obtain the arbitrary benefits provided for in Section 1. It provides that "any person desiring to avail himself of the provisions of this Act shall, between the first day of March and the first day of May, of each year, file with the Auditor of the county wherein said real estate is situate, a sworn statement" of

(a) The amount of such mortgage indebtedness existing and unpaid on the first day of March of that year, giving

(b) The name and residence of the mortgagee;

(c) The name and residence of the assignee or bona fide holder, if known;

(d) If unknown, stating that fact;

(e) The record and page where the mortgage is recorded;

(f) A description of the realty upon which such incumbrance exists.

No affidavit as to the actual ownership of the realty is required, thus opening wide the door for fraud, and no provision is made for cases where the record, as in this case, shows a different owner of the realty than the affiant, whose deed was not recorded, or how, in such cases, the actual ownership is to be determined; whether by the affidavit or the record, or whether the Auditor must sit as a court to undo the Assessor's work and determine against whom the realty should be assessed.

We say this, not as a defense to this individual case, because, in so far as it relates to the particular affidavit in this case, we waive all propositions except the constitutionality of the law; we only mention these points to show the crudeness of the law or Act under discussion.

Section 3. This section provides that:

> "The County Auditor with whom such statement is filed, in case the money, notes or credits evidenced by such mortgage indebtedness be liable for taxation in any county in the State of Indiana other than the one wherein such real estate is situate, shall immediately certify and transmit a copy of such sworn statement to the Auditor of the county wherein the mortgagee, assignee or bona fide holder or owner of said mortgage resides, or wherein the money, notes or credits evidenced by such mortgage is otherwise taxable."

The weaknesses of this section are:

1. The Auditor must become an assessor, and, not only in this case, but in every case where an affidavit is filed, he must undo the County Assessor's work; deduct

from it seven hundred dollars, or such other sum as may be deductible, and, by a system and process of subtraction, make and establish a new "basis" of assessment and valuation, neither "ratable" nor "uniform," but arbitrarily fixed, and thus do over the Assessor's work.

2. He must decide next whether the "money, notes or credits evidenced by such mortgage indebtedness are liable for taxation in any county in the State of Indiana other than the one wherein such real estate is situate." Again he is made Assessor, to decide assessment questions, for which no authority, ways or means, or compensation are provided; a thing that, not being the assessing power or officer, he has no authority to do.

3. If he decides that the money, notes or credits are assessable in any other county in the State, he must send a copy of "such sworn statement to the Auditor of the county wherein the mortgagee resides," but there is no provision, or law, or requirement in the law, that

(a) Either makes the mortgagee or holder liable for tax on the amount deducted;

(b) Or which requires the Auditor, or Assessor, or any other person in the county to which the "sworn statement" is sent, to put it upon the tax duplicate against the holder of the debt;

(c) Or which requires the Auditor, even in his own county, after he deducts from the applicant's assessment a mortgage debt owned by a person in the same county, either to assess it against the holder of the debt, or which even authorizes him to do so.

(d) As to all mortgage indebtedness that may be held out of the State or county, there is no provision whatever. It is at once lost to taxation, forever, to the injury of every taxpayer, and in violation of the constitutional provision that requires the Legislature to "prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal."

By this provision there goes out from under taxation seven hundred dollars of each mortgage held out of the State, and how long will it be, under this law, if it be permitted to stand, until all our mortgage indebtedness will be held out of the State? Thus the whole framework of the argument as to equity of this law falls. It does not prevent the so-called "double taxation," because there is no law taxing the deduction to any one else. It is simply a means of exemption, and of taking a large amount of taxable property off the tax duplicate. The whole law was a bit of political buncombe that has cost every honest taxpayer a certain per cent. of taxes over and above that which he has heretofore paid. It discriminates against the thrifty man who has relieved himself from debt and his property from mortgages; it offers a premium for mortgage indebtedness and places a penalty upon thrift; it is not equitable; the proper adjective is iniquitous.

(e) Further, as to the State school funds, the law has a most disastrous effect. The public school fund of the State of Indiana now amounts to about twelve million dollars, held by the Auditors of each county and by the Auditor of State, who must, by

law, loan it and apply the income therefrom to the support of public schools. The individual loan is limited by law to two thousand dollars, and out from under taxation, by virtue of this law, goes seven hundred dollars of every loan which is made from these funds over the whole State. These funds are public funds, and not taxable, and when deducted from the mortgagor's assessment can not be taxed to any other person. As the loans from the school fund are limited in amount it instantly appears that the effect of the law is to exempt from taxation one-third of the amount of the school fund of the entire State. The fact is, however, that most of the loans from the school fund are in small amounts, and the average loan is nearer one thousand dollars than two, as an examination of the records in any county will show. Upon this basis the effect of this law is to exempt from taxation seven-tenths of every thousand dollars of the entire school fund, and it is but a matter of calculation to make it clearly apparent that the actual amount exempted from or lost to taxation is nearer three-fourths of the entire school fund than one-third.

The disastrous effect of this law, if permitted to stand, on the question of taxation, and its injustice to every taxpayer, can not be made more apparent than by this exclusion from taxation of this tremendous amount from the taxable funds which belong to the common school fund.

8. THE INFIRMITIES OF THE LAW.

Having thus analyzed the law we will state, briefly, the points wherein we contend it violates both the Constitution of the State of Indiana and the Fourteenth Amendment. The objections to it are:

1. The lack of constitutional uniformity and equality in the rate of assessment and taxation;
2. It is a special law for the assessment of taxes for State, county, township and road purposes;
3. It grants to one class of citizens privileges and immunities which, upon the same terms, will not equally apply to all citizens;
4. It exempts from taxation realty not held for municipal, educational, literary, scientific, religious or charitable purposes.

It is fundamental that if it shall be found, upon examination, that any one or more of these propositions is true, then the statute must be held invalid. We shall discuss them in their order.

1. The constitutional provisions hereinbefore set out have been in force in Indiana since November 1, 1851. Many statutes regulating the assessment and collection of taxes have been adopted by the General Assembly since said date, but never, until this Act was passed, has any law in this State attempted to exempt realty from taxation because it was incumbered by mortgage. Judge Dowling, in the able dissenting opinion, calls attention to this fact, and emphasizes it as the legislative interpretation of the Constitution for the half century elapsing be-

tween the adoption of our Constitution and the passage of this Act.

Section 1, Article X, of the Indiana Constitution, hereinbefore set out, requires that "The General Assembly shall provide by law, for a uniform and equal rate of assessment and taxation." There is no limitation upon this. There can be but one rate, "uniform and equal." We have already called attention to the fact that this constitutional provision consists of only two clauses, each separated from the other. The first clause, above quoted, relates only to the "rate." There is no other provision as to rate. There it stands, wholly unmodified, and providing for one rate, and only one. The bodies, state, municipal, county, township and school, make their several rates of assessments and certify them to the County Auditor, who combines them and calculates the total rate of assessment. The Assessor likewise reports to the Auditor his valuations made by law; the Auditor then applies the total rate to the assessment fixed by the Assessor and calculates the tax.

The second clause of the section relates only to valuation of the property for taxation, and provides that there shall be enacted "such regulations as shall secure a just valuation for taxation of all property," etc. The first clause fixes an unalterable rule of one rate, uniform and equal, and is the basic provision of the section. Under the second clause there must be provided ways and means to assess and value the property, so as to make the valuations just. In the valuation there may be variation, as men's judgment may differ as to what any taxable property

is worth; but to the value once fixed, the single rate must be applied to determine the amount of each man's taxes. The valuation may vary with the judgment of men; the rate can never vary, under this provision. Herein lies the weakness of this Act. The operation of it varies the rule.

To illustrate: A and B own adjacent lots valued at twenty-one hundred dollars each. A's lot is unincumbered. B's is incumbered for seven hundred dollars. The Assessor assesses each at twenty-one hundred dollars. The lists go to the County Auditor. B makes the necessary affidavit and is allowed the exemption, and pays only on fourteen hundred dollars, or two-thirds the tax of A. The amount deducted is arbitrarily fixed, and results, after the Auditor makes the deduction, in a new valuation, which the law says "shall form the basis for assessment and taxation for said realty." Thus the Asesssor's work is undone; his valuation supplanted by another valuation not based upon the value of the property, not made by the assessing officer, but reached by the deduction of the fixed statutory provision of seven hundred dollars. This not only varies the rate, as between A and B, but B's valuation for assessment is not the "just valuation for taxation" required by the constitutional provision.

As the Court in the dissenting opinion says, the word "just" in the context means, "correct, honest, true" value, and relates only to the Assessor's valuation. It can not relate to the rate, or the first clause of the section, or in any way modify the "uniform and equal" provision of the first clause of the section. Thus, A's lot is valued at

twenty-one hundred dollars; B's at fourteen hundred dollars, though lying side by side and of equal value, violating the well-known rule that the tax follows the thing against which it is assessed, and that the rate should be applied to the thing assessed at its "just" or "true" valuation. The only excuse for the difference between A's tax and B's is that one lot is mortgaged for seven hundred dollars. The fallacy of this proceeding lies in trying to reach the net amount the man is worth and applying the rate to that, instead of doing as the provision of the Constitution requires, viz., fixing a "just valuation" of the property itself and then applying the rate to that valuation. The first method of procedure violates the constitutional provision by applying the rate, not to the "just valuation" of the ground, but to that valuation less the mortgage lien permitted to be deducted. This method is illegal and in violation of the Constitution and rules laid down by the Courts.

Cooley's Const. Lim. (6th Ed.) 608;
2 Kent Com. 231;
Bright v. McCulloch, 27 Ind. 223;
Cleveland, etc., R. R. Co. v. Backus, 133 Ind. 513;
Willis v. Crowder, 134 Ind. 515.

A discussion of this branch of the case, most aptly put, will be found in the dissenting opinion of Judges Dowling and Monks, which is made part of the record in this cause. (Record, pp. 23-25.) The case could not be more forcibly stated than it is there.

2. The second objection to the law is that it is special, and in violation of Section 22, Article IV, of the Constitution, hereinbefore set out in this brief.

This provision of the Constitution prohibits the General Assembly from passing local or special laws for the assessment and collection of taxes for state, county, township or road purposes. To us, a mere reading of the law is sufficient to show its special character. It is not general, either as to the thing upon which it operates, or as to the persons who are benefited by its provisions. The very title limits the Act to the question of the taxation of "real estate incumbered by mortgage." It does not apply to real estate generally, nor to real estate incumbered by liens generally, but is confined arbitrarily, as it seems to us, only to such real estate as is incumbered by a particular kind of lien. This is certainly a violation of the constitutional provision against special laws, and discriminates against every other holder of real estate which is unincumbered, or which is incumbered by liens of other character. It thus discriminates, even, against other persons who own incumbered real estate, since the benefits of the law extend only to the man whose real estate is incumbered by mortgage. As Judges Dowling and Monks say, in the dissenting opinion (Record, p. 25):

> "It can not be defended on the ground that there are two separate estates in lands incumbered by mortgage, and that this fact constitutes a basis of classification. The law declares that for the purpose of taxation the mortgagor shall be deemed the

owner of real property until foreclosure and possession taken by the mortgagee. 'In cases of mortgaged real estate, the mortgagor shall, for the purpose of taxation, be deemed the owner until the mortgagee shall have taken possession of the mortgaged premises, after which the mortgagee shall be deemed the owner.' Sec. 28, p.—, Acts 1891; Sec. 8438 Burns, 1901.

It has been held repeatedly by this court that a mortgage conveys no estate in the lands mortgaged, but simply creates a lien. Sec. 1099 Burns, 1901; Reasoner v. Edmunson, 5 Ind. 393; Francis v. Porter, 7 Ind. 213; Norton v. Noble, 22 Ind. 160; Grable v. McCulloh, 27 Ind. 472; Fletcher v. Holmes, 32 Ind. 497."

Wherein lies the difference between a mortgage lien and other liens? How does a mechanic's lien, a vendor's lien, a tax lien, a street improvement lien, or any other character of lien upon real estate, differ from the lien of a mortgage? Why should the owner of land incumbered by mortgage be favored with an exemption from taxation of seven hundred dollars, and the owners of land with liens of other character, hereinbefore referred to, be excluded from the law? What is it that gives a mortgage lien more dignity, or makes it more deserving of exemption, than other liens? To our mind there is nothing; there is no reason for exempting the mortgage lien as against other liens, and the statute is a clear violation of the law against discrimination, and is, therefore, one of those special Acts prohibited by the above clause of the Constitution, and the Fourteenth Amendment.

The great class of persons referred to in the Act is the debtor; or, in a more limited sense, the debtor who owns real estate subject to lien. We doubt, even, if the first classification would be good, and certainly the last one is clearly bad—too limited. Now, where is there any authority, in law or in reason, for subdividing the class of debtors, or the class of owners of real estate incumbered by liens, into another class, as this law does for the owners of realty subject to a mortgage lien? And why should this class be favored by a special Act, and the other class discriminated against? The dissenting opinion of Judges Dowling and Monks (pp. 25-26 of the Record) sets forth a very happy illustration of this point. It says:

> "To illustrate the practical operation of the statute, let it be supposed that A, B, C, D and E, each, is the owner of a lot of the value of $1,400 on the same street, in the same block, in the same town. A's lot is subject to a mortgage lien of $700; B's to a vendor's lien of $700; C's to a mechanic's lien of $700; D's to a street improvement lien of $700; and E's to the lien of a judgment for $700. Can any reason, valid in law, be given why A should have the right to a deduction of $700 from the value of his lot, as the basis of assessment and taxation, but that B, C, D and E shall be denied that privilege? Why the amount of such valuation, remaining after such reduction shall have been made, shall form the basis for assessment and taxation for said real estate, in A's case, but that the full amount of the valuation of the lots owned by B, C, D and E, without any deduction for the liens upon

them, should form the basis of such assessment against them, it is impossible to discover.

"But even as among the favored owners of real estate encumbered by mortgage liens, the classification is unequal and unjust. If A owns a lot valued for taxation at $1,400, encumbered by a mortgage lien of $700, he is allowed a deduction of $700. But if B owns a lot valued at $500, encumbered by a mortgage lien of $700, he is allowed a deduction of $250 only. Upon what natural or reasonable basis do these discriminations rest? Is not the statute 'discriminative between individuals of the (so-called) class, and does it not select some for an exceptional burden?' Suppose, however, the reasons urged in support of the statute in question are valid; that as it applies to all persons belonging to a class into which all property owners of the State may at some time enter; and as it is not, in terms, limited to individuals of a class, it is therefore not in conflict with the Constitution. All enactments having these qualifications, it is said, are to be regarded as within the limitations of the Constitution. The owners of all real estate incumbered by mortgage constitute a natural class, and legislation applying to all of them is general and not special. It follows that the owners of all real estate incumbered by vendors' liens constitute another class just as distinct and quite as natural; the owners of real estate incumbered by mechanics' liens, another; the owners of real estate incumbered by street improvement liens, another; and the owners of real estate incumbered by judgment liens, still another. Therefore, no objection could be taken to a further Act of the Leg-

islature declaring that the owners of real estate liable for taxation in the State of Indiana, being indebted in any sum secured by a vendor's lien upon real estate, may have the amount of such indebtedness, not exceeding $1,000, deducted from the assessed valuation of the incumbered premises for the year, and that the amount of such valuation remaining after such deduction shall have been made shall form the basis for assessment and taxation for said real estate for that year. Then, other separate Acts fixing deductions of $1,500 for indebtedness secured by mechanics' liens; $250 for indebtedness secured by street improvement liens, and $100 for indebtedness secured by judgment liens, must also be unobjectionable. Could such legislation be defended? If not, by what argument can a classification, which selects as the objects of its favoritism one set of debtors, and excludes all others, notwithstanding their situation is, in every legal aspect, undistinguishable from that of the favored individuals, be saved from the condemnation under the Constitution?"

Upon this branch of the case see the following cases, the first of which is particularly applicable to the point of classification just argued:

Washington University v. Rouse, 8 Wal. 444;
Knowlton v. Supervisors of Rock Co., 9 Wis. 421;
Van Riper v. Pearson, 40 N. J. L. 1, 9;
State v. Hammar, 42 N. J. L. 435, 440;
Randolph v. Wood, 49 N. J. L. 85;
Lippman v. The People, 175 Ill. 101, 106;

Ex parte Jentzsch, 32 L. R. A. 664, 665;
Darcy v. San Jose, 104 Cal. 642;
Pasadena v. Stimson, 91 Cal. 238;
Cooley's Const. Lim., 393, 395;
Bank of the State v. Cooper, 2 Yerg. 599;
Officer v. Young, 5 Yerg. 320;
Griffin v. Cunningham, 20 Grat. 31;
Arnold v. Kelley, 5 W. Va. 446;
Lewis v. Webb, 3 Greenl. 326;
State v. Ellet, 47 O. St. 90;
State v. Hinman, 65 N. H. 103;
State v. Sheriff, 48 Minn. 236;
Hogg v. Mackay, 23 Ore. 339;
State v. Gardner, 58 O. St. 599.

The most praiseworthy industry of both counsel and court—and when we say "court," we refer both to the Judges who wrote the dissenting opinion and to the Judges who wrote the majority opinion—has been unable to find any State or Federal decisions which sustain an arbitrary classification of the character made in this law. We so assert, for the reason that the prevailing opinion in this case cites no such case; while, on the other hand, as we shall show, later in this brief, when we come to discuss the decided cases, there are many cases holding classification of almost identical character obnoxious to the several State and Federal Constitutions.

The case of Van Riper v. Pearson, supra, holds that classification "is a domain from which special and local legislation is utterly excluded whenever the legislative end can be effected by general law."

Also, that "interdicted local and special laws are all those that rest on a false or deficient classification * * * ."

The case of State v. Hammar, supra, holds:

> "There must be substantial distinction, having reference to the subject matter of the proposed legislation, between the objects or places embraced in such legislation and the objects or places excluded. The marks of distinction on which the classification is founded must be such, in the nature of things, as will, in some reasonable degree, at least, account for or justify the restriction of the legislation."

The case of Randolph v. Wood, supra, holds:

> "Such law must embrace all, and exclude none, whose condition and wants render such legislation equally necessary or appropriate to them as a class."

The case of Lippman v. The People, supra, decides:

> "The classification must be so general as to bring within its limits all those who are in substantially the same situation or circumstances."

The case ex parte Jentzsch, supra, decides:

> "A law is not always general because it operates upon all within a class. There must be back of that a substantial reason why it is made to operate only upon a class, and not generally upon all."

Also: That "While the classification was, in itself, arbitrary, as in this case, the law did not include all who came within the arbitrary classification thus made."

The case of Pasadena v. Stimson, supra, holds:

"The conclusion is that although a law is general and constitutional when it applies equally to all persons embraced in a class founded upon some natural, or intrinsic, or constitutional distinction, it is not general or constitutional if it confers particular privileges, or imposes peculiar disability or burdensome conditions, in the exercise of a common right, upon a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law."

The case of Darcy v. San Jose, supra, holds:

"Classification, however, must be founded upon differences which are either defined by the Constitution, or natural, and which will suggest a reason which might rationally be held to justify the diversity in legislation."

"Every one has a right to demand that he be governed by general rules; and a special statute that singles his case out as one to be regulated by a different law from that which is applied in all similar cases, would not be legitimate legislation, but an arbitrary mandate, unrecognized by the law." * * *

"The State, it is to be presumed, has no favors to bestow, and designs to inflict no arbitrary deprivation of rights. Special privileges are always obnox-

> ious, and discriminations against persons or classes are still more so, and, as a rule of construction, are always to be leaned against as probably not contemplated or designed." (Cooley's Const. Lim., 393, 395.)

Great stress was laid by counsel for the State, in his brief filed in these cases, upon the case of Florer, Treas., v. Sheridan, 137 Ind. 128. The statute in question was one relating solely to personal property, and permitted the deduction from personal property of all a man's debts, and made only the surplus or excess the subject of assessment and taxation. Whatever may be said of the propriety of that decision, it cannot be denied that the classification of the persons who were entitled to avail themselves of it was general; as it permitted the deduction of all the debts which a man owed from the value of his personal property it did not vary the ratio, a thing which is in "striking contrast" with the provisions of the Act before us. However, we do not even defend that law, and in that case the following very vigorous dissenting opinion by Judge Howard was filed:

> "I am constrained to withhold my concurrence in so much of the foregoing opinion as holds that the Constitution permits the enactment of a law which authorizes the deduction of debits from credits in the giving in of notes, choses in action, etc., for taxation. I am of the opinion that all the property of the State, including all credits, and save only such property as is expressly exempted by the Constitution, should be subject to equal and uniform taxation."

The dissenting opinion is short, but very pithy, in view of this discussion, and we cannot but feel that the vigorous dissenting opinion had the best of the argument.

3. We contend that this law grants to one class of citizens privileges and immunities which, upon the same terms, will not equally apply to all citizens, and therein particularly violates, also the Fourteenth Amendment to the Constitution of the United States.

The provisions of this Act of March 4, 1899, limit the the privileges therein provided for to a particular class of debtors, upon whose realty there is a mortgage. It does not apply, upon the same terms, to all citizens of the State. The law provides for a special mode of assessment, whereby a reduction of the valuation on the real estate made by the Assessor for purposes of taxation is brought about, and the remainder, which is left after the deduction provided for by the law, is made to constitute the new basis, or valuation, upon which the tax is calculated at the given rate.

Another section of the Act provides the terms, as we have shown, upon which this privilege may be claimed, and only a very limited class of debtors comes within its terms. The great body of citizens of the State is excluded from the benefits of the privilege secured to the few who own mortgaged realty. For instance:

(a) All who own land, but are not indebted at all, must be assessed upon the full value made by the assessor.

(b) All owners of land who are indebted, but whose debts are not secured by mortgage on the land, are excluded.

(c) All owners of real estate who may owe debts in the shape of liens other than mortgage liens, are excluded from the benefits of the law.

(d) All citizens not owning real estate, but who hold mortgaged goods and chattels, are denied the privileges of the law.

And the incidental granting of the privilege to one of these several classes of debtors denies it to all the others, because none of the others can make the affidavit necessary to put themselves within the favored class. Thus, it is apparent that another vice of this statute lies in the classification; it makes a class of mortgaged debtors within the great class, debtors.

And it is perfectly evident that, if this law is constitutional, another law might be drawn exempting some fixed amount of liens of other character against real estate, as judgment liens, tax liens, vendors' liens, and liens of all classes. It is perfectly evident, too, that if the law is constitutional the amount of seven hundred dollars may be increased, at any time, or varied in amount, as between the different kinds of liens, and thus the number of classes within a class made infinite.

If the law is to be upheld as constitutional, it is evident that different legislatures, by increasing the amounts, from time to time, and increasing the number of classes, could thereby accomplish the absolute exemption of all real estate from taxation. And, on the other hand, it is equally apparent that the class of mortgage debtors who have mortgages upon real estate might be further modified by mort-

gages amounting to ten thousand dollars, for instance, or any other sum, and might thereby bring the favored class, who are entitled to exemption, down to a dozen, or even to one person.

The fallacies of the law become so apparent, as it seems to us, upon critical analysis of it, that its unconstitutionality seems too plain for question.

4. We contend, further, that the effect of this Act is to exempt from taxation property not coming within the privileged classes set forth in the Constitution.

The constitutional provision which we have heretofore quoted provides for "a just valuation for taxation, of all property, both real and personal, excepting such only for municipal, educational, literary, scientific, religious and charitable purposes, as may be specially exempted by law." This provision of the Constitution, therefore, permits exemption within the limits of the exceptions. It will be noted that all the exceptions which are contained in the Constitution relate to property which is held for some public use or purpose, either for the municipality, or for educational, literary, scientific, religious or charitable purposes. There is nothing in any of the exceptions authorizing the exemption of private property of any person or individual, or any part thereof. The constitutional rule requires that all property shall be valued for taxation except that exempted by law within the bounds of the exceptions of the Constitution.

It seems clear, therefore, that seven hundred dollars exemption of mortgage indebtedness from the property of an

individual is a violation of that provision of the Constitution which requires that all property shall be taxed. It has never been contended by those who sought to defend this law that it comes within any of these exceptions. Indeed, Judge Gillette, who pronounced the majority opinion in this cause, says (Record, p. 15): "The enactment in question cannot be supported as an exemption law." But the practical effect of the law is to exempt seven hundred dollars of each person's property who owns mortgaged real estate, or that proportion thereof which is provided by the law.

The State's attorney undertakes to avoid the proposition that it is an exemption, by calling it a "deduction." But, call it what you will, deduction or exemption, the owner of land which is mortgaged enjoys the immunity, and is exempted from a portion of the tax with which all others are burdened. And, as taxes must be for the amount necessary to meet the public demands, the proportion in which the tax of the favored man is reduced necessarily increases the rate upon the other taxpayers, and the effect of the law is not only to exempt him from a portion of his burden, but, also, proportionally to increase the burden of the one not exempted.

The Constitution clearly prohibits any such exemption, or such favoritism, and we contend that any law which indirectly produces an exemption is void. That cannot be accomplished indirectly which the Constitution declares shall not be done directly, as Justice Field so pointedly holds in Huntington v. Worthen, 120 U. S. 97.

4. THE DECIDED CASES.

As we read the law, the question which forms the issue in this case has been many times decided, and decided adversely to the position of the defendant in error in this cause. We shall, in this connection, therefore, set out with some care those cases which, we believe, settle and decide all the questions involved in the issue herein. And first, merely on account of the locality, we call attention to the case of State ex rel. Tieman, et al., v. City of Indianapolis, 69 Ind. 367, which the Circuit Court of Marion County held to be decisive of this whole question.

The relators sought to mandate the said city to refund certain taxes alleged to have been wrongfully collected. The relators were a widow and two unmarried, minor daughters. They had inherited from their deceased father certain real estate, and upon the realty had paid taxes for sundry years, which they alleged were unlawfully assessed by reason of the provisions of Section 7, of the Act of December 21, 1872. (Acts 1872, p. 57.)

It was an act entitled, "An Act to provide for a uniform assessment of property, and for the collection and return of taxes thereon." The Act is long, being in forty-eight sections, and undertook to set out a complete scheme or system for the asssessment of property for taxation. We cannot set it all out, but beg the court to examine it. Section 7 of the law provided that:

> "The following property shall be exempt from taxation: * * * Eighth—The property, to

> the amount of five hundred dollars, of a widow or unmarried female, or of any female minor whose father is deceased, if her whole estate, real and personal, not otherwise exempted from taxation, does not exceed in value the sum of one thousand dollars.

The court says, page 376 of the opinion:

> "The appellants insist that the facts averred in the affidavit bring the case within the clause cited, and that the writ of mandate is the proper remedy. We do not now nicely examine these questions, as there is a question underlying the controversy which must first be settled.
>
> "Had the General Assembly of the State of Indiana the constitutional power to enact the eighth clause of Section 7, as above quoted?"

Then follows the constitutional provision under discussion in this case, and the opinion of the court holding the law unconstitutional. We cannot burden the court with long quotations from it, but it seems to us to settle this case, and so the Circuit Court of Marion County thought and held. It contains the best discussion of this constitutional provision in our reports, and has continued to be the law since, and no Legislature, from 1872 to 1899, had the temerity to attempt to further trespass against this plain constitutional provision, and this interpretation of it. Its reasoning is unanswerable, and its conclusions are plain. It cites many authorities, and is conclusive of the whole question.

The same question arose again in the case of Warner et al. v. Curran, 75 Ind. 309.

The appellee, Curran, bought certain lots described, at tax sale, and brought suit, after obtaining a tax deed from the Auditor, to foreclose his tax claims on the lots. The defendants demurred, but Curran obtained judgment for his tax claims, and a decree for the sale of the lots to pay his claims. The appellants appealed, and sought reversal on the ground that three of them were infants, and the owners of one-half of the realty, as the descendants of one Luzern Warner; that they were unmarried females, under twenty-one years of age, not owning property exceeding five hundred dollars in value, and their property was therefore claimed to be exempt, under the same law discussed in State ex rel. Tieman v. City of Indianapolis, supra. This was the burden of their answer, and the court again held the law unconstitutional, saying:

> "It was held by this court, and, we think, correctly so, that this eighth clause of Section 7 of the assessment law of December 21, 1872, was unconstitutional and void." (Opinion, p. 312.)

Thus the court emphasized and reaffirmed its former opinion.

This same question was again decided adversely to the position of the Attorney-General and the State in the case of

> People v. Eddy, 43 Cal. 431.
> 13 Am. Rep., p. 143.

The case was an action for the recovery of taxes which were assessed upon certain solvent debts due to the defendant on certain promissory notes, which were secured by mortgage upon real estate. There was a demurrer to the complaint, and the court says, in the opinion:

> "The demurrer presents the question of the constitutionality of the Act of April 1, 1870, entitled, 'An Act to prevent double taxation,' Cal. Stats. 1869-1870, page 584."

The constitutional provision, as set forth in the opinion, is as follows, being Section 13, Article II of the Constitution of California:

> "Taxation shall be equal and uniform throughout the State. All property in this State shall be taxed in proportion to its value, to be ascertained as directed by law."

The law passed by the Legislature provided that "no mortgage or lien, given or held upon real estate, or the debts thereby secured, or promissory notes secured by a mortgage, shall be assessed upon the books of any Assessor, State, county or otherwise." The court, passing upon the constitutionality of the Act of the Legislature, held that where the State constitution provided that "all property in the State shall be taxed in proportion to its value," "an Act exempting mortgages, and debts secured by mortgage, from taxation was in violation of the Constitution and void."

The first section of the Act was the one which was in question in the case, and the court said (Opinion p. 144):

> "That the purpose of the first section of the act was to exempt from taxation solvent debts secured by mortgages upon real estate is, we think, beyond all question. An ingenious argument is presented by the appellant to show that such is not the purpose of the act—that it was merely to regulate the duties of assessors. It is insisted—and correctly so—that it is within the power and is the duty of the Legislature to prescribe the mode in which all property shall be assessed; and it is claimed that this Act is only a legitimate exercise of such power. But the argument is merely specious. Looking beyond the mere words of the Act—the shadow—it is seen that the Act, if enforced, effectually prevents the taxation of debts secured by mortgage upon real estate. And this is the direct effect, as we have no doubt it was the purpose of the Act. If the Constitution requires this property to be taxed, the Legislature, under the guise of regulating the duties of assessors, can no more exempt it from taxation than they could accomplish the same result by providing that the collector should return to the taxpayer the amount collected on such property, under the pretense of regulating the duties of tax collectors. The manifest purpose of the Act is to exempt such property from taxation. Its true features are quite apparent, notwithstanding its attempted disguise."

So here, the learned Attorney-General can argue as much as he pleases that this is a deduction and not an ex-

emption, but, just as the court says in the California case above quoted, the effect of the law was to exempt a vast amount of property from taxation, and the effect cannot be avoided under the specious argument that it is a deduction, lawful in form, but the real intention of it was, as in the Act in question in this case, to relieve the mortgage debtor from a certain portion of taxation against the mortgaged property; and especially is this true, in view of the fact that there is no provision whatever in the law taxing the deduction against any other person or persons in any other county or counties. To call it a deduction instead of an exemption is but a transparent fraud, whereby the learned counsel for the State seeks to maintain the law under the guise of specious argument that it is a deduction and not an exemption.

This is truly a case where, by the mere process of subtracting, as the State's Attorney says, the subtrahend from the minuend, an enforced appraisement of the property is obtained, arbitrarily, and upon the amount obtained by this new method of assessment, as provided by the law, and in the words of the law, the tax is then levied at a certain rate. We can not, of course, quote this opinion at greater length, but a reading of it will show to the court that it is decisive of the whole question, and quite as decisive as the cases from Indiana heretofore quoted from.

Another case which decides the same question upon the same principles, and in the same way, is the case of Hogg, Receiver of R. R. Co., v. Mackay, Sheriff, 19 L. R. A. p. 177; also in 31 Pac. R., p. 779; and 23 Ore., p. 339.

It is an Oregon case, and the Attorney-General has most carefully called the attention of the court to the fact that the Oregon Constitution is an exact copy of the Constitution of the State of Indiana. This is not true of the Oregon law, which we shall take up and discuss later, but it is true of the Constitution. The constitutional provisions of Oregon and Indiana are identical.

In this case the Legislature of Oregon passed a law which was entitled: "An Act to provide for the construction of the Willamette Valley & Coast Railroad," which Act was approved October 24, 1874 (Oregon Laws, 1874, p. 51), as extended by the Act approved February 5, 1885 (Oregon Laws, 1885, p. 77), and which read as follows:

> "Section 11. That if said Willamette Valley & Coast Railroad Company shall, within ninety days after the approval hereof by the Governor, file in the office of the Secretary of State its agreement, duly executed under its corporate seal, obliging itself to carry all troops and munitions of war of this State required to be conveyed on its road without charge to the State for a period of twenty years from and after such approval, without other compensation than the moneys arising from taxes assessed, levied or collected on the property of said company, then, in consideration of said agreement and said services, done, or to be done, for said period of twenty years, said company shall have and receive during all said term, all the taxes levied, assessed or collected, or which might have been levied or collected, by the State, upon all its property, real and personal, and said taxes are hereby appropriated therefor."

And the contention was that this section was in violation of the provisions of the Constitution of the State, that "all taxation shall be equal and uniform," and that the Legislature "shall provide by law for uniform and equal rate of assessment and taxation," etc., exactly as provided in our constitutional provisions.

The court then says:

> "The power of taxation and the right to prescribe what property shall be taxed is a sovereign right, belonging to the State in its sovereign capacity, and, in the absence of a constitutional restriction, necessarily implies the power to prescribe what property shall be exempt from taxation; and hence it has been held that, when not prohibited by the State Constitution, the Legislature can bind the State, by a contract with either an individual or corporation, to surrender the right of taxation, by the grant of either a perpetual or transient immunity from taxation," etc.

Then the court goes on to say that whatever the powers of the Legislature might be in the absence of a constitutional provision, the constitutional provision existing in Oregon (and being the same constitution that we have in Indiana), that

> "The provisions of the Constitution are mandatory that all taxation shall be equal and uniform, and the Legislature shall prescribe regulations for a just valuation of all property for taxation, excepting only the enumerated classes. The language of the Constitution is plain, simple, and easily under-

stood, and manifestly operates as an absolute inhibition against the exemption, either directly or indirectly, of any property from taxation except that specifically enumerated."

The court cites in support of this:

Huntington v. Worthen, 120 U. S. 97;
Crawford v. Linn Co., 11 Ore. 494;
Chesapeake & O. R. R. Co. v. Miller, 19 W. Va. 408;
Zanesville v. Richards, 5 O. St. 589;
People v. McCreery, 34 Cal. 432;
Fletcher v. Oliver, 25 Ark. 289;
Nashville & K. R. R. Co. v. Wilson Co., 89 Tenn. 597.

The decree of the lower court holding the Act constitutional was reversed. We request the court to read the case carefully, as it also is decisive of the entire question in this case.

The case of Barber, Sheriff, v. Louisville Board of Trade, 82 Ky. 645, decides the same question in the same way. In this case, the Louisville Board of Trade was incorporated March 15, 1862, under a charter granted by the Legislature. On April 23, 1873, the charter was amended as follows:

"Any real estate held by the Louisville Board of Trade in the City of Louisville, by purchase in fee simple, not exceeding one hundred by two hundred feet in area, and any improvements thereon, shall be, and are hereby exempted from all State taxes, so long as said property shall be occupied by

> said Board of Trade for the purpose contemplated in its organization. And the general council of the city of Louisville is authorized to exempt such property so held and occupied from all taxes to be levied by said general council of said city of Louisville."

Under this Act the Board of Trade was organized in 1879, and purchased real estate in Louisville. The sheriff brought an action to enforce the collection of taxes against the real estate, and it was defended on the ground that the charter provisions exempted the Board from the payment thereof. The lower court found in favor of the Board. The court states the question as follows: (Opinion, p. 648.)

> "The question presented on the appeal is whether the property of the Board of Trade is exempt from State taxation by reason of the Act of 1873, quoted. This involves the inquiry as to whether that Act is constitutional."

The court discusses the general powers of governments in the absence of a constitutional restriction, and holds, in the opinion, that, even in the absence of a constitutional restriction, this charter provision is a violation of the common law. It further holds that the provision is in violation of the 28th Section of the 13th Article of the Kentucky Constitution, which provides:

> "That the General Assembly shall not grant any title of nobility or hereditary distinction, nor create any office, the appointment of which shall be for a longer time than for a term of years."

The court says, in its opinion, page 651:

> "Whatever difference of opinion there may be as to whether the first section of the Thirteenth Article of the Constitution applies in restraint of the grant of privileges as directly presented between individuals, there can be no doubt that this provision is a restriction upon the exercise of the taxing power. It is certainly a 'public privilege' to be exempt from taxation. The exercise of such power is purely an act of sovereignty. Independently of any constitutional provision, the surrender of such an element of sovereignty is never to be presumed. Every intendment is against it so strongly that a reasonable doubt of the legislative intention to surrender or limit must be solved against such intention. Uniformity and equality of taxation is the essence of the power, and an exception in one case is the increase of the burden of taxation upon others not thus favored."

And the conclusion of the court is that the charter provision in question was unconstitutional, and the opinion of the lower court was reversed.

The case of Jones v. Mayor and Aldermen of City of Little Rock, 25 Ark., page 289, also decides this question adversely to the position of the State. In this case one Fletcher, on behalf of himself and the other taxpayers of the city of Little Rock, filed his bill for injunction against Oliver, sheriff, and ex-officio collector of taxes, to enjoin him from attempting to collect a certain road tax assessed and levied by the county of Pulaski, on the property of the said county lying in the limits of the city of Little Rock.

The law under which it was claimed that their property was exempt from the road tax in question reads as follows:

> "The inhabitants of Little Rock are hereby exempted from working on any road beyond the limits of the city, and from paying any tax to procure laborers to work upon the same."

The provision of Article X, Section 2, of the Arkansas Constitution was as follows:

> "Laws shall be passed taxing, by a uniform rule, all moneys, credits, investments in bonds, general stock companies, or otherwise, and also all real and personal property, according to its true value in money; but burying grounds, public school houses, houses used exclusively for public worship, institutions of purely public charity, public property, property used exclusively for public purposes, shall never be taxed; * * * but the General Assembly may exempt from taxation personal property to the value of five hundred dollars to each taxpayer."

The complaint alleged that the provision of the law exempted the complainant and all other inhabitants of the city from paying the tax, and the court says that it becomes its duty "to inquire whether there is any conflict between this clause of the law and that provision of the Constitution." The lower court held against the complainant, and the Appellate Court affirms the decision.

The reasoning of the court is most excellent, and we desire particularly, by reason of the fact that we have already

argued that question, to call the attention of the court to this particular feature of the decision which we quote:

> "Taxing by uniform rule means by one and the same unvarying standard; uniformity not only in the rate of taxation, but uniformity in the mode of assessment by which the value is ascertained. There must be an equality of burden."

We call attention to this portion of the decision particularly, for the reason that in our previous discussion of this case we have already carefully pointed out that the valuation by the Assessor is the basis of taxation in the case of every one whose real estate and property is not incumbered by mortgage, but that this law which is in question in this case specifically provides that in the event there is a mortgage upon the real estate, seven hundred dollars, or one-half of the appraised value, shall be deducted from the assessed value, and that the sum obtained by the "subtraction of the subtrahend from the minuend shall constitute a new basis of assessment." Thus we have, as we have already clearly shown, two methods of assessment, which this opinion says is a violation of the law of uniformity. We can not quote further from this interesting case, but we hope the court will find it possible to read the instructive opinion and unanswerable reasoning of the court.

The case of Life Association of America v. Board of Assessors of St. Louis County, 49 Mo. 512, again decides this question.

In that case the Assessors of St. Louis County assessed the appellant two hundred and ninety-four thousand dollars on its property. To obtain relief from the payment of the tax the suit was brought, and on the trial the assessment was sustained.

The appellant was an association organized on the mutual plan for the assurance of lives, and it was claimed that, by the State law (Wagn. Statutes, 752, Section 40), such insurance companies were exempt from taxes. This section provided that such insurance companies shall pay certain fees for the support of the insurance department, and which "shall be in lieu of all taxes, fees, and licenses whatsoever," etc. It further provided that all such companies "shall pay all fees required in this section, which shall be in lieu of all fees or taxes whatsoever, except that they may be taxed upon their paid-up capital stock, in the same manner as other property in the county, for county and municipal purposes.

There were two provisions in the Missouri Constitution, the first of which (Article I, Section 30), provided that "all property subject to taxation except such as may be used exclusively for public schools, and such as may belong to the United States, to this State, to counties, or to municipal corporations within this State."

The law was held unconstitutional. The special feature of the case to which we desire to call the court's attention is that portion of it in which the plaintiff contended that "although the Legislature may not have power to exempt property from taxation, it has power to commute taxes,"

etc. Just as here, the Attorney-General claims that this law only "deducts," but does not exempt. The court held adversely to that contention, and that the law in question was an exemption and therefore unconstitutional. The opinion shows the fallacy of such arguments.

The State v. Lautz, 53 Md. 578, also incidentally decides this case, in that it holds the Act deducting mortgage indebtedness in that State does not apply to mortgages which can not be taxed to others. But there is no such exception in the law of this State by which the court could accomplish this. Our law covers all mortgage indebtedness, whether the security is taxable property or not, and whether the mortgagee be resident or nonresident, and has no provision requiring the taxation of the mortgage security against the mortgagee anywhere.

The general rule of law is, that the State has no power to tax mortgages held by nonresidents, at the locus of the mortgaged property.

> Foresman v. Byrnes, 68 Ind. 247;
> Senour, Treas., v. Ruth, 140 Ind. 318;
> Holland v. The Comrs., etc., 27 L. R. A. 797;
> Cooley on Taxation, pp. 21-22.

Mortgage indebtedness held by a nonresident mortgagee, on every legal principle must be taxed at the place of his residence.

> Murray v. Charleston, 96 U. S. 432;
> State v. Earl, 1 Nev. 397;
> Myers v. Seaberger, 45 O. St. 232;
> Arapahoe Co. Comrs. v. Cutter, 3 Colo. 350;
> People v. Eastman, 25 Cal. 621.

A debt, for purposes of taxation, is situated at the domicile of the creditor, although secured by mortgage upon real estate situated in another State. This is the general rule.

Ex parte Clark, 100 U. S. 401;
State Tax on Foreign Held Bonds, 82 U. S. 15;
Eells v. Holder, 12 Fed. Rep. 668;
San Francisco v. Mackey, 22 Fed. Rep. 602;
Cooley on Taxation, 63;
1 Desty on Taxation, p. 62;
Foresman v. Byrnes, 68 Ind. 247;
Senour, Treas., v. Ruth, 140 Ind. 318;
Baltimore v. Hussey, 67 Md. 112;
State v. Vansyckle, 49 N. J. L. 366;
State v. Darcy, 2 L. R. A. 350; 51 N. J. L. 140;
Bradley v. Bauder, 36 O. St. 28;
Grant v. Jones, 39 O. St. 506;
Worthington v. Sebastian, 25 O. St. 1;
Holland v. Comrs., etc., 27 L. R. A. 797;
St. Paul v. Merritt, 7 Minn. 258;
Liverpool, etc., v. Board, 44 La. An. 760;
Goldgart v. People, 106 Ill. 25;
People v. Eastman, 25 Cal. 603;
People v. Smith, 88 N. Y. 577;
Territory v. Del. Tax List, 24 Pac. Rep. 182 (Arizona);
Com. v. Chesapeake & O. Ry. Co., 27 Gratt. 344.

So far as we know, and so far as the industry of the Attorney-General has led us to believe, there are but two

exceptions; one is the State of Michigan, and the other is the State of Oregon. In each of these States, however, there is a special statute which provides that, for purposes of taxation, real estate mortgages shall be held to be realty, and partake of the character of realty, and, therefore, may be assessed in the State even against non-residents. Both States have this peculiar law.

The question of what should be the law in a State where such a law is not in force arose in the Montana Supreme Court, and the question was decided on March 11, 1895, in the case of Holland v. Comrs. of Silver Bow County, reported in 27 L. R. A., at page 797. There the court was confronted with exactly the question that the State raises in this case, that both the State of Michigan and the State of Oregon had held that the law was constitutional, and yet, the court decides the proposition under the general law. We quote from the decision, as it is clearly decisive of this whole case.

The court goes on to say, in the opinion, that the opinion of Justice Field to the effect that mortgages are taxable at the residence of the holder thereof has been generally approved all over the country, and that such property has, for taxation, "no situs independent of the domicile of the owner." Then the court takes up the case of Detroit v. Detroit Board of Assessors, 91 Mich. 78, which has been cited by the attorneys in the case, and which had decided that the law of Michigan taxing mortgages owned by non-residents was not unconstitutional, and says:

"The statute of that State, however, expressly provided that any 'mortgage by which a debt is secured, when land within this State is pledged * * * shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the land so pledged.' The court held that the Legislature could give a situs to mortgages where the land was situated, treating them as interests in realty, though held by nonresidents. In distinguishing the case from the State tax decision, supra, the court says that the statute of Michigan 'imposes a tax upon an interest in real estate as such,' while the decision of the Supreme Court of the United States was that a tax could not be imposed upon the bond itself, which had a situs at the domicile of its owner. A careful examination, therefore, of the Michigan case, demonstrates that the Legislature, in the opinion of the court, had the power 'to fix the situs for the purpose of taxation at the place of the location of the property mortgaged,' and that real estate mortgages, for the purpose of taxation, could be treated as interests in lands. The Oregon cases cited recognize a statute of that State similar to that of Michigan, and uphold its constitutionality. But until the Legislature passes such a law in Montana it is unnecessary to inquire into its validity, for we are of opinion that in the Revenue Law of 1891 there is no provision giving a situs to mortgages owned by nonresidents as property within the State. The general rule must, therefore, control, and the case be determined adversely to plaintiff."

The above quotation states the case in a nut shell, and is to the effect that so long as there is no such statute in any State as the statute in Michigan and Oregon, the general law or rule controls. We need hardly say that there is no such statute in Indiana. Not only is there no provision in this law that, for the purposes of taxation, real estate mortgages shall be held to be realty, but there is no provision in this law which requires the placing of the amount of seven hundred dollars which is deducted, or of any other amount, either against the local holder of the mortgage, or against the nonresident.

Thus, even on the theory of the State itself, the Montana court, considering this very proposition, has held that in the absence of a statute like the statute of Michigan and Oregon, the general rule controls. This is the situation in Indiana. We shall come, later, to a more particular discussion of the statute laws of the States of Michigan and Oregon. The State of Michigan has, as we are informed, since been relieved of this troublesome question by the wisdom of the Legislature which repealed the law.

The State of Indiana has distinctly decided for the general rule, in the cases of

Foresman v. Byrnes, 68 Ind. 248; and
Senour, Treas., v. Ruth, 140 Ind. 318.

5. STATE'S BRIEFS AND AUTHORITIES.

The State having filed its briefs setting forth its position, in the previous litigation in this case, we desire to discuss, for a few moments, its former position relative to the issues in the cause.

It is amusing, sometimes, to see how ingenious counsel contrive ways to avoid the effects of the Act when they are seeking to sustain its constitutionality. The State in its brief sought to avoid the proposition that this is an exemption law, and claimed that it was not an exemption, but a deduction, and that deductions are constitutional. Yet, the compiler of the statutes, an able and experienced man who has been, for years, in the business of compiling statutes in Indiana, and who happened to issue a new edition of the statutes of 1901, and who was called upon to place this new Act in its proper place in the statutes, instantly placed it under Article X of the Tax Law, the heading of which is, "What Exempted," and there it appears as Sections 8417a, b, c and d. It is curious how great men will differ. There he thought it belonged; and there it does belong. But ingenious counsel, hunting for a means to sustain this unusual law, and seeing no possible way to defend it as an exemption, undertakes to claim that it is a deduction. The court, as we have heretofore shown in a quotation made from the majority opinion in this cause, says that the law can not be sustained, for a moment, as an exemption law.

In its former briefs the State set out what it called the deduction laws of other States, we suppose on the theory that this law was a law of like character. In their previous briefs counsel cited what they called the deduction laws from fourteen States. These several so-called deduction laws of the different States take many various forms, but, after all, are substantially alike in their provisions. The State, in its brief filed in the Supreme Court

in this cause, said: "Nearly every State in the Union deducts indebtedness, either from credits, personal property, or real estate, or all of them."

As a mere illustration of the laws from which they argue that this law is constitutional, they cite first the law of Connecticut, and we shall discuss this law for a moment, for the pure purpose of showing the difference between the acts they cite and the law in question in this case. We take the first one, because it illustrates, as well as the balance of them, the peculiar differences between this Act and those of other States. It reads:

> "If any resident in any town shall be indebted to another resident in this State, in such manner that the debt is liable to be assessed by the State in the list of the creditor, * * * the Board * * * shall * * * deduct the amount thereof from the list of such debtor, and add the same to the list of the creditor."

Notice the peculiarities of the law:

> (1) The debt to be deducted must be to another resident in the State;
>
> (2) It must be such a debt as is liable to be assessed by the State in the list of the creditor; and
>
> (3) It is therefore provided that the amount deducted shall be added to the creditor's list.

Not one of the above features is in the Indiana law. These are the features that make such a law equitable. It is called a deduction law. There is, in fact, no deduction,

but a mere transfer of the debt from one person to another for taxation. The so-called deduction is allowed:

(a) Only on debts due to other residents of the State;

(b) And the debt must be such a debt as is liable to be assessed by the State in the creditor's list; and

(c) At the moment of the deduction from the debtor it must be added to the creditor.

By this law nothing is exempted or escapes taxation; it is a mere transfer from one person to another of the debt, not a deduction at all. If the debt be to a non-resident, or is a debt not liable to be assessed to the creditor in the State, it can not be deducted or transferred. But our law has no such equitable provision. Its every sentence is but a means to take property off the tax duplicate. This Connecticut law thus exempts nothing. What it takes from one it adds to the other. It takes all the debt from one and adds it all to the other, thus preserving ratio, equality and uniformity, and nothing is lost to taxation. Is the fact that such a law is held constitutional any argument that our law is constitutional, when our law has no one of the above features of the Connecticut law? Certainly not. The mind that can see any argument to sustain our law in the above law and the holding of the Connecticut courts upon it, must be gifted with second sight. The remaining features of the Connecticut law are of like character, and we do not stop to further discuss it. It is plainly no precedent to sustain the Indiana law.

The State, in the several briefs which have been filed in this cause, has argued at great length concerning the Oregon law. We quote this law, also, by reason of the fact that the State has laid so much stress upon the matter. It must be borne in mind, also, that the Oregon Constitution is an exact copy, on the question of taxation, of the Indiana Constitution; that is, it has as a section Section 1, Article X of the Indiana Constitution, involved in this cause. The law is as follows:

> "Section 2752. * * * It shall be the duty of the Assessor to deduct the amount of indebtedness within the State, of any person assessed, from the amount of his or her taxable property, but no such indebtedness shall in any case be deducted unless it be real, bona fide indebtedness due from the person assessed as principal debtor, and not on account of any contingent liability as surety, endorser or otherwise."
>
> Oregon Annotated Statutes (2d Ed., 1892).

It is instantly noticeable, on reading this section, that the Assessor may deduct,

> (1) Only indebtedness in the State; and
>
> (2) That it is the indebtedness that is deducted; that is, all of it, and not a fixed portion like seven hundred dollars.

But one further thing appears, by quoting the law a little farther, which the State neglected to do in its brief. It will be found that the above section stands in a general

law concerning taxation, and that a little farther along in the law is the following section:

> "Section 2757. Nothing in the foregoing shall be construed to apply to mortgages, deeds of trust, contracts, or other obligations in favor of the State, or the Board of Commissioners for the sale of school or university lands, or judgments in favor of the State or any of its educational funds."

Thus it will be seen that the Oregon law has none of the faults of the Indiana law. We quote only a portion of the statute, although the balance of it is quite as relevant to the matter in hand, but this is the portion which particularly exempts all State funds from the operation of the so-called deduction or exemption law. It is one of the very things that we have complained of in relation to this law in Indiana, and yet, we see that every time we come in contact with one of these so-called deduction or exemption laws it has in it provisions guarding against the very faults of the Indiana law. Just like the Connecticut law, it exempts only such debts as can be transferred to the list of another man, and over which other man the State has authority and control by reason of the fact that he is a resident. It also excludes from the deduction or exemption features all obligations due to the State, or any State or educational funds, like our school fund. These laws are, therefore, no criterion by which to adjudge the constitutionality of the Indiana statute, for the reason that they have provisions in them for all of the objections which have been made to the Indiana law. Any authorities, therefore, holding them

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constitutional have little weight or force as applied to the Indiana statute, which lacks all the features of their law.

One thing more in regard to the effects of this law. It is well known that building association mortgages have been held to be nontaxable to the corporation, in Indiana. The building association secretaries are kept busy, every tax year, making calculations and giving the amounts to their mortgage debtors for exemption purposes, under this law, and yet, not one of all the building association mortgages all over the State is taxed to the corporation, and the effect of this law is, also, to exempt seven hundred dollars of the mortgage indebtedness of every mortgage to the building associations all over the State. Add this amount, also, to the forty millons of deductions which the Attorney-General admits escapes taxation every year by this law, and the effect of this law is to add an additional forty millions; so that, instead of fighting for this law, he should be assisting us to have it declared unconstitutional.

As we have heretofore said, the industry of the Attorney-General was able to turn up these deduction laws in only fourteen States. These States are Connecticut, New Jersey, New York, Michigan, Illinois, Iowa, Oregon, Kansas, Minnesota, Nebraska, North Dakota, South Dakota, California and Washington. Of these, Connecticut, New Jersey and Oregon exempt only debts due to creditors in the State. All, except Michigan and Oregon, deduct only from credits, if this may be called a deduction, at all. Most of them, as we have heretofore shown, amount to mere

transfer laws, transferring the amount of taxes or assessment from one person to another, and never affecting the gross amount of the taxes or the income of the State, at all. No one of them, so far as we know, deducts a fixed amount, as the Indiana law does. We very briefly call attention to their provisions.

The Connecticut law, which we have hereinbefore quoted, deducts indebtedness owed to another person in the State, when it can be transferred to the list of the holder of the debt. Is is, therefore, a mere transfer law, and does not take a dollar off the tax duplicate.

Conn. R. S. (1888), Sec. 3854.

The New Jersey law is exactly like the Connecticut law, in every respect, deducting only debts due in the State.

R. S. N. J. (1709-1895), Vol. 3, p. 3298.

Th New York law permits the "deduction of just debts owing," from the total amount of the lists of personal property, excepting "debts or liabilities contracted or incurred in the purchase of nontaxable property."

Birdseye's R. S., 2d Ed., Tax Law, Vol. 3, p. 3094.

The law of Michigan provides that "a mortgage on real estate within this State, for the purposes of assessment and taxation, shall be deemed and treated as an interest in such real estate, * * * *" and the real estate, less the mortgage or the value of it, is all that is taxed or assessed against the owner of the property. That is, all debts are

deducted, and not a fixed and stated amount, and the ratio or rate is not thereby varied.

Mich. Acts of 1893, p. 288.

The State of Illinois permits the deduction from "the gross amount of credits the amount of all bona fide debts."

Starr & Curtis' An. Stats. (1896), Chap. 120, par. 27.

The Iowa code provides that the taxpayer "shall be entitled to deduct from the actual value" of his list of credits "the gross amount of all debts."

Iowa Code (1897).

The Oregon statute we have already quoted at length and referred to. It deducts all indebtedness.

Ore. An. Stats., 2d Ed. (1892), Sec. 2752.

The law of the State of Kansas provides that "debts * * * may be deducted from the gross amount of credits."

Kans. Stats. (1899), Sec. 7165.

The law of the State of Minnesota provides that after making up the list of credits the taxpayer "shall be entitled to deduct from such gross amount the amount of all bona fide indebtedness."

Minn. Stats. (1894), Sec. 1526.

The law of the State of Nebraska provides that from the list of credits the taxpayer "shall be entitled to deduct

from the gross amount of the credits the amount of all bona fide debts owing by such person."

Neb. Stats. (1901), Sec. 4308.

The law of North Dakota provides that the taxpayer "shall be entitled to deduct from the gross amount of credits the amount of all bona fide debts owing * * *."

N. Dak. Stats. (1887), Sec. 1543, clause 6.

The law of South Dakota provides that from the list of credits the taxpayer "shall be entitled to deduct from the gross amount of credits the amount of all bona fide debts owing by such person."

S. Dak. R. S. (1899), Sec. 2135.

The law of California provides for the deduction of all debts.

Deering's Annotated Codes & Stats. (1885), Sec. 3650.

The law of the State of Washington provides that the taxpayer shall "be entitled to deduct from the gross amount (of credits) all debts in good faith owing by him."

Ballinger's Annotated Codes & Stats. (1897), Sec. 1657.

It will thus be noted that debts are permitted to be deducted in toto—that is, all a man's debts—by the provisions of these several laws, and none of them attempt to deduct a fixed and stated amount, and thereby they preserve uniformity of ratio, and uniformity in the method

of assessment; while the Indiana law has one method of assessment for the man without a mortgage upon his property, and another and new basis of assessment, made by another officer, the Auditor, for property upon which there is a mortgage.

The State of Indiana allows no deductions. It used to allow deductions, and the law relating to the same will be found in Section 6332 of the Revised Statutes of 1881, and it is this law which the court had in mind, and which it discussed and held constitutional in the case of Florer, Treas., v. Sheridan, Admx., 137 Ind. 28, to which the Attorney-General gave so much attention in his former briefs in this cause. This case shows, on its face, that it is under the old law. It reads (Opinion, p. 30): "The complaint, in substance, alleges that on the 8th day of February, 1890," etc., showing that the case arose in 1890, under the law of 1881. The new Act on taxation was passed by the Legislature of Indiana in 1891, and will be found in the Acts of 1891, pp. 199 to 291, inclusive. It consists of two hundred and sixty sections, and was a general law covering the entire question of taxation. With the amendments which have been passed to the law since that date by the several Legislatures, and to which we shall refer later, it is the law at this time in Indiana, controlling and governing taxation. Section 259 of the Act repealed all laws within the purview of the Act, including also the Act of March 8, 1889. In other words, it was a new general law, covering the entire subject of taxation.

Section 6332 of the Revised Statutes of 1881, which is also the Act of 1881, disappears from the Revised Statutes; is not published in the revision of 1894, nor in the revision of 1901, and is, undoubtedly, repealed; so that the decision in Florer, Treas., v. Sheridan, Admx., 137 Ind. 28, based upon that law, is no longer an authority, since the law itself has not been the law in Indiana, and the statute which it passed upon has not been in force since 1891. The only statute that we have had since 1891, relating to the question of deductions in any way, is Section 4 of the Act of 1891, which will be found on page 199 of the Acts of 1891, and the amendment to that section which was passed in 1895, and which is now the law, and appears as Section 8411 in the Revised Statutes of 1901.

Section 3 of the Act of 1891, which appears as Section 8410 in the Revised Statutes of 1901, provides:

> "That all property within the jurisdiction of this State, not expressly exempted, shall be subject to taxation."

The next section, which is the one we have heretofore referred to, defines what shall be real estate and what shall be personal property, and says:

> "For the purposes of taxation * * * personal property shall include all goods and chattels within the State * * *; all indebtedness due to inhabitants of this State, above the amounts respectively owed by them, whether such indebtedness is due from individuals or corporations, public or private, or whether such debtors reside within or without the State; * * *."

It will thus be seen that the Indiana law does not tax credits, or allow deductions from the credits, but specifically provides that only the credits above the amount owed shall be subject to taxation. The law, therefore, does not allow deductions of indebtedness from credits, and there is no such thing as deduction of indebtedness from credits in this State. The surplus alone is taxable by the law, and it is not a process of taxing credits and deducting indebtedness, but the law itself specifically provides as to credits that only the excess over indebtedness shall be taxable property. The indebtedness is, therefore, excluded from consideration in the statute, and it is not at all, as we have said, a question of taxing credits and deducting indebtedness.

This is the only construction which will make the law harmonious with Section 3 which preceded it, and which says that all property within the jurisdiction of the State shall be subject to taxation, unless expressly exempted. The Attorney-General says that we confuse deduction with exemption. This argument falls when it appears, as it does from an examination of the statute, that there is no such thing as deduction under the Indiana statute. To his mind this statute presents itself as a deduction rather than as an exemption, but an examination of the Revised Statutes of 1901 will show that Article II thereof, which purports to set out what is "exempted," contains within itself, as Section 8417a, b, c and d, this law as one of the exemptions granted by law. It is placed alongside of United States property, municipal property, charitable property,

churches, cemeteries, and other exempted property, and it seems to us that it would strike every reasonable person, except the ingenious lawyer who wanted an excuse for making it something else, as an exemption. We admire the effort of the Attorney-General to make something else than an exemption of it, because to admit, for one moment, that it is an exemption is to concede the unconstitutionality of the law. But, as the Indiana law no longer allows deductions even from credits, his argument that it is a deduction and not an exemption is fallacious, in the face of the fact that the Indiana law no longer allows deductions from credits, and the statute providing for deductions of indebtedness from credits disappeared from the statutes when the new tax law of 1891 went into force, and has never been a part of it since.

The fact that neither exemption nor deduction exists in Indiana except under this law, makes it unnecessary for us to examine further the several exemption laws referred to by the Attorney-General in his several briefs, holding that deductions are allowable from credits, since this is no longer the law in Indiana, and has not been since 1891. Attention is called, however, to this universal fact, that wherever there is deduction from taxation in these laws there is some provision for the transfer of the amount deducted to the other person, and the limitation, in the most of them, is to creditors who hold claims which may be legally taxed by the State against the creditor. As the laws deduct all indebtedness, also, they do not vary the

rules of uniformity in assessment, and do not make two bases or methods of assessment, as does the Indiana law.

We must, however, call attention further to the fact that each of these laws, and its peculiar provisions in the cases which relate to the same, have been held good, where the Supreme Court has passed upon the matter, under the particular provisions of the State Constitution of that State, and the constitutional provisions in all of these States have varying exceptions, differing from the Constitution of the State of Indiana, and none of the laws, unless it is the Oregon law, which has exactly our constitutional provisions, is strictly in point in the case. The fact that such laws have been held constitutional under the peculiar provisions of the several State Constitutions is no argument in favor of the constitutionality of a law which, by its terms, exempts the value of almost the entire school fund of about twelve million dollars, together with the Congressional fund, all mortgages held by non-residents, and seven hundred dollars of each building association mortgage, from taxation. The State, in its brief, says that the deductions have amounted to over forty million dollars, and if the deduction of the building association mortgages be considered in addition to those referred to, the deductions have probably amounted in Indiana to over eighty million dollars.

We concede that the State is not limited to one method of taxation, provided the method it adopts is in conformity with the constitutional provision. But whatever method it adopts must be in conformity with the Constitu-

tion. The effect of this law is not to relieve one and tax it against another, but it exempts millions of dollars due to nonresidents and to the school fund entirely from all taxation against any one, and this is in the very face of the constitutional provision.

The State has claimed in its briefs that

> "By this law the State, in a small measure, has attempted to relieve the landowner of the tax on a part of his lot or land covered by this mortgage," etc.

This the State perhaps might have done by a proper law, but this law simply does that at the expense of the other taxpayers, and without ratio or uniformity. It would have been better, so far as the legal features are concerned, to have exempted all of the mortgage debt, instead of an arbitrary amount, since the law would then have had the advantage of a ratable and uniform exemption instead of an arbitrary amount as it now has in its present shape. It would have been better had it "gone further," as the State's attorney well says. But it would not then have been constitutional, unless it had provided for the exemption to be taxed against the creditor, and have further prohibited the exemption in the case of foreign-held debt, and nontaxable creditors, like the school fund. The effect of deduction in its present form is to make the other taxpayers pay the bill, since the gross amount of taxes must be enough to pay the public bills, without reference to who pays it.

The State has claimed that the case of Savings and Loan Ass'n v. Multnomah County, 169 U. S. 421, clearly de-

cides this case. It does not, for we have already heretofore shown that the courts have decided (Holland v. Commrs., etc., 27 L. R. A. 797), that this is not the case where no law has been passed by the Legislature making mortgages for taxation real estate. The court, as we have already shown, in that case held that in the absence of such a law as was passed in Oregon and Michigan, the general rule and not the special rule applies. This case, cited in 169 U. S., p. 421, is an Oregon case, under the Oregon statute, where the Legislature had passed the law making mortgages realty for taxation. Indiana has no such law, and, as the court says in Holland v. Commrs., supra, the rule is different where no such law has been passed.

Further, even, this case was not the one before the court. It only decided that a nonresident could, under the Oregon law, be made to pay taxes on its mortgages. It was held that the law having been passed, making the mortgages realty for taxation, the nonresident, in a case where such a law had been passed, could be made to pay the taxes; but there is no exemption feature similar to the one in the case at bar passed upon at all. And even this case was decided by a divided court, Justices Harlan and White dissenting. It does not decide the point at issue in this case, since it was a case between the nonresident mortgage holder and the county for the collection of the taxes, and not one at all between the owner of the land and the county over the deductions or exemptions. So that even if the court had decided our question in that case, it would be mere dicta, since our question was not the issue in the cause. The court says in the case (Opinion, p. 425):

> "The result is that nothing is taxed but the real estate mortgaged, the interest of the mortgagee therein being taxed to him, and the rest to the mortgagor. There is no double taxation. Nor is any such discrimination made between mortgagors and mortgagees, or between resident and nonresident mortgagees, as to deny the latter the equal protection of the laws."

This is said of the Oregon law, but the same can not be said of our law. We have already shown how it does discriminate between all parties, how it differs from the Oregon law, and how it violates the constitutional provision.

The court says (Opinion, p. 426):

> "The case, then, reduces itself to the question whether this tax act, as applied to mortgages owned by citizens of States and in their possession outside of the State of Oregon, deprives them of their property without due process of law."

That is the only question in that case, and it is not our question here at all. Indiana has no law taxing the mortgages held by nonresidents to them, as Oregon has. But the amount of such mortgages, under our law, is simply lost to taxation; every other taxpayer is thus discriminated against, since he must pay so much more taxes to foot the amount of the public bills.

The State's briefs said of this law:

> "We have charged the mortgagee with the full value of the mortgage, and have charged the mortgagor the full value of the land, less a maximum of $700."

That may have been what was intended to be done by this law, but clearly that is not what has been done. To whom is taxed the amount deducted for school fund mortgages and mortgages held by building associations and nonresidents? Let the State answer these questions if it can.

Then the State said:

> "The Supreme Court of Oregon has frequently been called upon to pass on the validity of its law * * * and a few of the cases will be cited."

The first one cited and quoted from, as sustaining the validity of the law, is Wetmore v. Multnomah Co., 6 Ore. 463, but the court, in the opinion in that case, says:

> "The question which counsel for appellant argued so exhaustively can not be considered in this proceeding; it could only arise and be presented if the Assessor had refused to allow a deduction for indebtedness within the State. Then, perhaps, we could consider the numerous constitutional questions presented in this argument."

So, then, the court in this case did not, as the State's brief claimed, pass upon the validity of the Oregon law therein. The State is mistaken; the court in the opinion says so. It is just as far wrong in the remainder of its citations.

The State next cited Crawford v. Linn Co., 110 Ore. 482. Another case under Oregon's peculiar law which we have already discussed and distinguished from ours. And

from this opinion it appears that (Opinion, p. 48) the U. S. District Court of Oregon, in March, 1884, in the case of Dundee, etc., Mortgage Co. v. School District, held the Act "unconstitutional and void" on two grounds: "first, because it does not provide for equal and uniform taxation, and second, because it is a special law."

The question in this latter case is whether the law is unconstitutional in its different provisions for what are known as "one county" and "two county" mortgages. The law provided for the deduction of the mortgage indebtedness from the valuation of the land where all the land lies in "one county," but prohibits deduction where the land mortgaged lies in "two counties," part in each, and the only question raised in the case is the constitutionality of the law by reason of these "one county" and "two county" provisions, and the case only passes on the constitutionality of the law as to these provisions. We have no such question in the case at bar, and the case decides nothing relating to our question.

The case of Talcott v. Glastonbury, 64 Conn. 575, was next cited by the State as an authority. We have, heretofore in this brief, discussed the Connecticut law, and pointed out its peculiar features and provisions, and have shown how radically it differs from the Indiana law, which has not a single feature of the Connecticut law. We must ask the court to recall that portion of this brief. But in this case one of the features of this law was that when a mortgage on property was executed, a tax of one per cent. on the face amount of the note might be paid in ad-

vance, for the term of five years, and, when so paid, the Treasurer should indorse the exemption from taxation upon the note for the term. That was done in this case. The statutes are quoted (Opinion, p. 576). It will be noted, too, that the court, and all persons, including the law, call this an "exemption," and not a "deduction." The town authorities insisted upon taxing the debt again, notwithstanding the tax had been paid five years in advance, and was exempted, and was duly exhibited to the officials, and the court only holds that the tax having been paid they could not tax it again. The debtor was entitled to exemption. The tax had been paid. The creditor was a resident, and only claimed exemption because the tax was paid. There was no constitutional question like ours in the case at all. It also appears that such exemptions and special contracts for taxation are lawful under the Connecticut Constitution.

They also cited Hall v. Bain, 18 R. I. 413. It has no constitutional question in it, either directly or indirectly discussed. The plaintiff, under protest, paid illegal taxes charged against him. He sued to recover it. The lower court held against him on an agreed statement of facts. The Appellate Court reversed the decision. The court says (Opinion, p. 415):

> "The case was argued on the part of the defendant as if it was one merely of over-taxation, and it was contended that the plaintiff was without remedy," * * * but it is one of illegal taxation as well."

Therefore they gave judgment against the city for the overcharge. The constitutionality of the law was in no way in issue. It was tried on the general issue, without demurrer, or any question of law being raised. It was entirely a question of fact.

They cite State v. Runyon, 41 N. J. L. 98. The New Jersey statute, which is set forth in the opinion (p. 100), provides that:

> "No mortgage or debt secured thereby shall be assessed for taxation, unless a deduction therefor shall have been claimed by the owner of the land, and allowed by the Assessor."

Not the Auditor, as in our law. Another section provides, just as the Connecticut law did:

> "That such mortgages or debts secured thereby as shall be subject to taxation, shall be assessed for taxation by the Assessor, making the deduction on account thereof, and the tax collected."

The law, in other words, limits the deduction feature both to residents, and to "debts which are taxable against the creditor," both of which features we have already shown are wanting in our law. The court says in the opinion (p. 101), that if the holder of the debt lives in another State, "the deduction of the mortgage debt from the gross amount * * * of estate * * * would be impracticable." That is the case of our Indiana law. If the State can get any support in this case from such a holding, it is welcome to it.

The court says, of the constitutional provision (Opinion, p. 104), that it only provides that "property shall be assessed for taxes under general laws and by uniform rules, according to its true value," and that in all other "respects, the legislative power over taxation was left unimpaired." This means that there are no restrictions on taxation or exemption in the New Jersey Constitution, and in such a case, as we have already shown, the power of exemption is unlimited. In other words, having no constitutional restriction, as we have, the Legislature could pass any law it desired, if the law be "general" and the rule "uniform." In the absence of a constitutional restriction the case is no authority in a case where there is a restriction, as there is in Indiana. It is too plain to spend further time upon.

Next after New Jersey, the State refers us to New York State, and cites four authorities. It quoted the statute which we referred to in its brief. The most cursory reading of the four cases cited will show that they decide no question under the law quoted, or which relates to the question in this case. Not one of the cases, except the 155th New York case, even refers to this question. Examine them a moment.

People v. Barker, 147 N. Y. 31, cited in the brief, was a case brought by the relators to review the action of the authorities in assessing them under that section which provided that "all persons and associations doing business in the State of New York as merchants, bankers or otherwise, * * * and not residents of this State, shall be assessed and taxed," etc. The only question in the

case was whether a nonresident could be taxed. The court says in the opinion (p. 38):

> "The question is as to the true construction to be given those words of the statute which provide that all persons nonresidents of the State and doing business herein, shall be assessed and taxed on all sums invested in any manner in said business the same as if they were residents of this State."

This is not our question at all, and we do not see why the case was cited.

The case of People v. McLain, 80 N. Y. 254, has less relevancy to the issue than the case last above discussed, if that be possible. It was a question of where the relator should be assessed, in Ossining, Winchester County, New York, or in New York City. The relator was a Massachusetts corporation, working prison contracts at Sing Sing. The court holds that they should have been assessed in New York City, instead of at Ossining, and this is the only question in the case.

The case of McLean v. Jephson, 123 N. Y. 142, also cited by the State, has just as little relevancy to our case as the two cases above discussed. The issue was over the same section above referred to, taxing nonresidents with a business in New York State. The court says plainly, in the opinion, that this is the question, and the case does not touch or discuss the question at issue in the case at bar. It is utterly irrelevant.

The only other case cited is People v. Barker, 155 N. Y. 330. In that case the only question is one of the amount of the deduction; whether certain debts for non-taxable property shall be deducted when the property had already been deducted. No constitutional question as to the law is anywhere raised or discussed, at all. It does, on the other hand, call these deductions "exemptions," and says that they are allowable under the New York Constitution. In other words, the New York Constitution is without restrictions. We have already discussed the law in such a case, and need not repeat it. Hence the New York citations are not authorities in our question.

The next case cited was Fuller v. Kane, 110 Mich. 549. We have already called attention to the Michigan law, which, like the Oregon law, makes mortgages real estate for the purposes of taxation, it being one of two States wherein that law has passed. The case cited by the State, however, contains no constitutional question whatever. It was a contest over who paid the taxes, the mortgagor or the mortgagee. It is plainly stated in the case that,

> "Prior to 1891 mortgages were assessed against the mortgagee, and the real estate was assessed against the owner. By the Act of 1891 the Legislature provided for the assessment of mortgages as an interest in the land, and relieved the mortgagor from taxation on so much of his property as the mortgagee's interest represented. Prior to the enactment of the law, in October of 1889, the defendant executed a mortgage with a condition to 'pay or discharge, or cause to be paid, within the

> time prescribed by law, all such taxes and assessments as shall by any lawful authority * * * be levied and imposed upon such premises above described.' "

The court further says (Opinion, p. 550):

> "The sole question presented in this case is whether the stipulations above quoted imposed upon the mortgagor the duty of paying the taxes assessed under a law subsequently passed, providing for an assessment against the mortgagee's interest."

It was a contest between the two, in other words, in view of the change of the law, which one of them was obliged to pay the taxes. It raised no constitutional question, and no such question was discussed in the case. It was only a question of contract.

The next case cited by the State was the case of Edwards v. The People, 88 Ill. 340. We have already called attention to the fact, in this brief, that the Constitution of Illinois is very different from the Constitution of the State of Indiana. Its provisions will be found in its Constitution, under the head of "Revenue," Article IX, Sections 1, 3 and 6. It provides that,

> "The General Assembly shall provide such revenue as shall be needful, by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property."

The only provision in the Illinois Constitution is that it shall pay by valuation. Certain exemptions are also therein provided for, which we do not stop here to quote. We have already said that we do not quarrel with the proposition that indebtedness may be deducted from credits. It might, perhaps, also be deducted from real estate, as we have said, if it were done ratably and with uniformity, but the deduction of an arbitrary amount, without reference to whether it can be taxed to anybody else or not, is the thing which we object to in this State, and this case does not turn upon that proposition. It is true it decides that the fact that certain credits and deductions may be allowed any person for personal property does not establish a want of uniformity, but, under the assessment provided by Section 27, quoted in the State's brief, all indebtedness is deducted on each person. This preserves a ratio; but when it comes to deducting an arbitrary amount, as seven hundred dollars, as we have already shown and argued in this case, ratio and uniformity are thrown to the winds. If, like the Connecticut law, there had been a provision that all indebtedness which should be deducted should be taxable to some other person or persons in the State, then the law would not have been open to the objections which we have made against it; but, when the amount is arbitrary, without ratio or uniformity, even this Illinois case does not sustain such a law or such a holding, nor has any case been decided in any State wherein an arbitrary amount, fixed by the Legislature, may be deducted without reference to ratio or uniformity. Under these circumstances,

of course, this Illinois case is not authority upon the proposition.

The Iowa statute was cited by the State, but no authorities were cited upon it.

Reference was made to the Kansas and Minnesota statutes, and to two citations:

> Bank v Barker, Treas., 24 Kans. 546; and
> State v. Jones, 24 Minn. 251.

The most cursory examination of the questions involved in the case of Bank v. Barker, Treas., 24 Kans., supra, shows that it has no earthly bearing upon this case. The Court opens its opinion by saying that "the sole question presented to the court for its decision in this case is the validity of Section 7, Chapter XC, of the laws of 1870," and the section is then quoted. It relates to the levy of township taxes, and the bank, who brought this suit, endeavored to compel the county to pay certain railroad bonds and coupons out of the taxes. There is no question like that in this case at all, and we can not see on what theory the case is cited. The case also held the law unconstitutional, and affirmed the judgment of the lower court. There is not the slightest suggestion in it that is relevant to the issues in this case.

The case of State v. Jones, supra, was a case where the State sought to compel the payment of certain delinquent personal taxes assessed against fifty thousand dollars' worth of notes. The circumstances attending the giving of the mortgage were these: The defendant owned land and

deeded it to one Gale for sixty thousand dollars, ten thousand dollars cash and fifty thousand dollars in notes. Both the land and the notes were assessed for taxation. Jones sought to avoid the payment of the taxes against the notes by alleging that, while there were no papers relating to the matter except the deed, mortgage and notes; yet, as a matter of fact, the property was simply deeded to Gale for the purpose of enabling him to handle it; that he was irresponsible, and was never expected to pay the notes; that the mortgage and notes, in other words, represented only one value. The whole case is a question of fact, and there was no question of exemption or deduction, or anything of that kind, in it. The court refused to permit the violation of the contract as expressed in the papers by the verbal contract, and held the taxes valid. There was no question in it which is in the slightest way relevant to the case at bar.

The case of People v. Savings Society, 51 Cal. 243, was cited. This was a case where the State sought to make the Hibernia Saving and Loan Association pay taxes on something in excess of eleven million dollars in mortgage securities on real estate situated within the State. The question, and the only question in the case, is, whether or not these were taxable property; and the court in that case held that they were not taxable property; they were choses in action, and not taxable. There is no question of deductions in the case, nor any question of exemption, nor any constitutional question, like the case at bar, at all. Three judges wrote concurring opinions, and another dissented,

in that case, but it does not have the slightest relevancy to any issue in the case at bar.

Hewitt v. Dean, 91 Cal. 5, was cited. In this case Hewitt sued Dean to foreclose a mortgage. There are three points in the case, the first and last of which are entirely foreign to any possible question in this case. The second point raised in the foreclosure of the mortgage was, that at the time of the execution of the mortgage there was an agreement made and entered into, which is set out in the opinion, to repay two and one-half per cent. of the interest to the owner of the property, or to allow him a rebate of that much upon the interest, if they presented a receipt for all the taxes upon the property on or before a certain day in December of each year. Answering to the foreclosure suit, the defendant said that this contract was illegal, and in violation of the clause of the Constitution which is referred to, and that by reason thereof the contract was a void one, and that the plaintiff could not collect any interest on his debt, and this was the issue in the case. The court goes on to show that in California, under their new Constitution, it was provided:

> "Every contract hereafter made, by which a debtor is obligated to pay any tax or assessment on money loaned, or on any mortgage, deed of trust, or other lien, shall, as to any interest specified therein, and as to such tax or assessment, be null and void."

This was the Constitutional provision. Section 4 of the same Article provided:

> "A mortgage * * * by which a debt is secured shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby. * * * The value of the property affected by such mortgage, * * * less the value of such security, shall be assessed and taxed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof. * * * The taxes so levied shall be a lien upon the property and security, and may be paid by either party to such security."

This constitutional provision was passed for the purpose of avoiding the proviso, which had escaped notice, on mortgages which were executed in California, that the maker of the mortgage should pay not only the tax upon the property, but the tax upon the security. But the whole question was one of contract, and the court simply held that the agreement was solely on the part of the mortgagee, and was not binding or enforceable against the mortgagor. The court says:

> "It is well known that prior to the adoption of the present Constitution it was the universal custom for the mortgagee to incorporate into the mortgage a stipulation binding the mortgagor to pay all taxes that might be levied upon the mortgage or the debt secured thereby. * * * As a consequence * * * money loaned upon mortgage security escaped taxation, and the owner of the land mortgaged was compelled to pay more than his share of the expenses of government. It

> was for the purpose of obviating this consequence that the Constitutional Convention adopted the foregoing provision * * * . The provision thus incorporated into the Constitution was intended for the benefit of the borrower, but it is unnecessary to say that the results expected therefrom have not been realized. All experience has shown that the rate of interest is governed by the inflexible laws of trade, and is regulated by the same law of supply and demand as that which governs all other articles of commerce, and that Legislatures and Constitutional Conventions are powerless in their attempts to change this law."

The court then goes on to say that if by a contract between the parties, they made an arrangement that the owner of the property was not only required to pay the taxes, but upon the presentation of a receipt the interest thereon shall decrease and diminish, such arrangement is not only not in conflict with the letter of the Constitution, but is in direct harmony with its spirit and the evident purpose of its framers. It will be seen at once that there was no possible question in the case like the one at bar. And it will be noticed, too, that the California Constitution has the peculiar provision of the Oregon and Michigan law, making the security taxable in the State, and making the tax a lien upon it.

Finally, the State wound up its brief with a discussion of Florer, Treas., v. Sheridan, Admx., 137 Ind. 28, which we have already discussed at some length in this brief. Having shown that the law to which it is related has been

repealed, and is no longer in force, we do not consider it worth while to take the time of the court to further discuss that case, especially as we have heretofore stated, in this brief, that we do not quarrel with the law which deducts indebtedness from credits. Our contention only is that this particular law, attempting to deduct an arbitrary amount from the assessment on real estate, is invalid and opposed to the constitutional provision, in view of the fact that no provision is made for taxing the mortgage against the mortgagee, where he is out of the State, and in view of the fact that no exception is made where the indebtedness is non-taxable property, whereby great quantities of property entirely escape and are exempted from taxation.

The State closed its brief by saying that the Chief of the Bureau of Statistics had furnished it the amount of deductions for the year 1900, and shows the amount for the entire State to be thirty-seven million, six hundred and sixty-five thousand, one hundred and thirty-three dollars and thirty-two cents, and assumes that more has escaped, and that the real amount is nearer forty millions, and yet, in the face of this very proposition the State is seeking to defend a law which adds another ten millions to the amount of this deduction. If this be the case, and we assume that these figures are correct, the State should, along with us, be asking the court to hold this law unconstitutional, instead of seeking, as it does in its brief, to add another ten millions to the amount of this deduction, which escapes taxation.

It is said, also, that "this law is a partial abatement of double taxation." On the other hand, we have shown that not only is it not an abatement of double taxation, but it renders it necessary to tax every other tax-payer an additional sum, or pro rata, in order to make up the losses of the property which will escape taxation by this vicious law. It said that it has looked in vain for the decision of any court of last resort in this country that declared a different doctrine from that set forth in its brief. If this be true, it need not look longer, for we have cited authorities in this brief which will certainly satisfy its curiosity. The fact that no provision is made to deduct only debts which are taxable against other parties, and only debts against persons in this State, is probably enough to exclude from taxation another forty million dollars, in addition to the amount hereby referred to by us. There will be practically ten millions of property represented by the loans from the school fund escape taxation if this law be held valid, and how much more, held by non-residents, is a matter that none of us can estimate, but certainly it will run into millions of dollars.

The real viciousness of the law, however, lies in the proposition that it is not a ratable deduction, but a deduction of an arbitrary amount, and provides two methods of assessment, so that property is no longer valued on a ratable basis, or with uniformity. Very substantial reasons have been given why this law should be declared unconstitutional; the authorities in Indiana have already held that there was, under the law, a "just valuation of all

property" before the passage of this Act; therefore, where the State gets any justification for the statement, in its brief, that if this law is stricken down the Constitution will not be complied with, we can not see. This law was a sporadic Act, engrafted upon a general system which has been declared constitutional. If there is any disturbance it is because this monstrosity has been injected into the law. True, we can not expect taxation to be perfect, nor that there will ever be any law of taxation which will not affect some individual injuriously, but, as the court, in its dissenting opinion, so pointedly says, in response to the charge that absolute equality of assessment can not be attained:

> "It is claimed that absolute uniformity and equality of assessment can not be attained, and therefore the law must be satisfied with something less. The answer to this proposition is that the obstacles to uniformity and equality contemplated by the courts which have used this language are those which inhere in the nature of things, such as the fallibility of men's judgment as to values, the mistakes and omissions of public officers, and the frauds of owners. They are never such inequalities and differences as are created by the law itself. While the efforts of the law to produce absolute uniformity and equality may be ineffectual, the Constitution demands that the taxing statutes shall aim at these objects, and that such statutes themselves shall be free from provisions which destroy them."

Our tax system was fairly good prior to the passage of this law, but this Act has injected into it the most incongruous thing that has ever been perpetrated upon any tax-paying people.

6. THE MAJORITY OPINION.

A reading of the majority opinion in this case does not seem to show any strong, logical argument upon which the results and conclusions of the court are based. It decides the questions, but the premises laid down in the opinions are not clearly stated, and the deductions do not always follow from the premises stated. The opinion opens with a sort of apology for the decision that is to follow.

1. It is proper, we admit, in cases which involve great constitutional questions, to approach the same with caution, and with due respect for the co-ordinate branch of the government which passed the law. But if the action of any co-ordinate branch of the government be erroneous and unconstitutional, there is the high duty of the judiciary, as the court of last resort, to speak out plainly and boldly, and strike down such a law as subversive of the popular right. No squeamish notion of respect for any co-ordinate branch should embarrass a court in such a case, or prevent it from pointing out the error and directing that co-ordinate branch into the true and beaten path of constitutional law.

It is an erroneous doctrine that "the judiciary" may not "lay claim to a conscience that is quickened beyond that of

any other official." It should lay claim to such a conscience, since upon it rests the great duty, at the end of all exhaustive examinations of every question, of determining right from wrong. It is this great privilege and right of the judiciary that should and does quicken its conscience beyond that of other officials. Other officials act with full knowledge that beyond them is another tribunal, constituted and empowered to correct errors, if any they shall make. But the court of last resort acts, on the other hand, with just as full knowledge that its decision is final, and that from its decrees there lies no appeal. Why should not its conscience be quicker, when, no matter whether its final decree be right or wrong, from that time forth it becomes the law to govern and direct men in their future actions? True, "courts do not sit for the purpose of obstructing legislative action," but it is erroneous to maintain that they do not sit to "revise legislative action." That is their high prerogative.

It is equally erroneous to maintain that the courts sit "to enforce the legislative will." They do not. It is their high prerogative and solemn duty, in the event the legislative will is subversive of constitutional right, to refuse to permit the enforcement of the legislative will, and quicken its conscience and direct its return to the path of rectitude.

The court should not approach the duty of passing upon the constitutionality of a legislative Act "with a disposition to enforce it," as seems evidently to have been the rule in this case; but, on the contrary, should approach

such a question with a calm determination to seek the right rule of law in the premises, and, when it shall have been found, to follow it, even though it conflicts with the legislative will and undoes it. This is the true law. To approach the question "with a disposition to enforce the legislative will" is to sit as a biased judge; yet, the court says in its opinion: "It is with this disposition of mind that we approach this question."

True, the extent to which the taxing power shall be exercised is in the Legislature, but it is there under the limitations set by the people in their Constitution. These great constitutional limitations the Legislature has no right to overstep, and when it does so the duty of the court is plain; it should speak out and say to the Legislature: "Thus far shalt thou go, and no farther; beyond this constitutional limitation you may not go." And it should speak vehemently and with knowledge of its power.

2. The next argument advanced is, that perfectly equal taxation is an unattainable good; but Judge Dowling, in his dissenting opinion, has so satisfactorily answered this argument that it need be discussed no further.

3. The court say, in deciding this case: "As a general rule, taxes due on property are not debts of the owner thereof," and cites Thompson v. McCorkle, 136 Ind. 484. A reading of the opinion in that case will show, it seems to us, that, so far from holding that doctrine in this State, the court holds and announces just the opposite doctrine in the very case cited, on pp. 500-502. But, if this be true,

it wholly destroys the argument of the court's opinion. The opinion says:

> "If it can be fairly said that the equality limitation in the Constitution was designed to prevent inequalities in the assessment of different tracts of real estate, considered as a matter wholly apart from the interest of their owners therein, then there would be room for serious doubt as to the justification of legislation that discriminates within the class, and which permits a deduction of $700 in the assessment on one tract of mortgaged real estate, while that right is wholly denied as to an adjoining, unincumbered tract of real estate."

If "taxes due on property are not debts of the owner thereof," as the opinion alleges, and cites authorities to show, it must follow that the taxes are assessed upon the realty, without reference to the owner. This being true, the taxes being an assessment against the land and not the owner, the opinion admits too much, for it admits that "then there would be room for serious doubt as to the justification of legislation that discriminates within the class, and which permits a deduction of $700 in the assessment on one tract of mortgaged real estate, while that right is wholly denied as to an adjoining, unincumbered tract of real estate." In truth, here the court, starting with the assertion that "taxes due on property are not debts of the owner," admits the unconstitutionality of the law involved in such a case. The court then adds:

> "When the people put the equality limitation upon the power to tax, they intended thereby to protect the owners of property. We must, therefore, regard the limitation that taxation must be equal as being satisfied when there is no discrimination as between tax-payers."

This is just the point we contend for, that there is discrimination between tax-payers in this law, as we so plainly showed, even among the class within the pale of the law, as well as against those without the law. The minority opinion in this case makes this feature of the law so clear that it can hardly be conceived how it is not plain to every one.

4. Then, proceeding, the court seems to us again to admit the infirmity of this Act when it says:

> "The selection of some objects for taxation and the omission of others, * * * does not necessarily disturb the rules of equality, * * * But when, for any reason, it becomes discriminative between individuals of the class taxed, and selects some for an exceptional burden, the tax is deprived of the necessary element of legal equality, and becomes inadmissible."

What stronger argument could we ask in this case than this? The Act in question has been plainly shown to discriminate between holders of realty—even between holders of incumbered realty, also. For, if A's property is assessed for $1,400, and is mortgaged for $700, and is re-

lieved of taxation on fifty per cent. of the value; and, on the other hand, if B's property is assessed for $1,000 and mortgaged for $700 balance of purchase money, and he is relieved of seven-tenths of his taxation, there is no equality and no ratio in this.

Again, if A's property be assessed at $2,100 and is mortgaged for $700, he pays on $1,400, or two-thirds value; while, if B's property is assessed at $1,000 and is mortgaged for $700, he pays only on three-tenths of the value. The discrimination between those of the class seems to us so evident that we can not conceive how the court can escape the consequence, or avoid the conclusion, under its own statement of the case, that the act is unconstitutional. But the court does not apply the law to the fact. To us it seems that the court's opinion itself demonstrates the infirmities of the law quite as plainly as we have tried to do it in our brief.

5. Again, it seems to us, the court, in the opinion, admits the case when it says: "We may freely grant that with this Act in force it will produce inequalities as between taxpayers in any given year." But the court adds: "We confidently affirm that it is beyond the ken of the most astute to say who will receive the most benefit from it in the future."

True, if one were left to speculation, it would be "beyond the ken of the most astute" to know how the law would operate. But this law has now been in force since March 4, 1899. Marion County alone has demonstrated its inequalities to a nicety. For a long time our tax rate

was substantially $1.65. At the next levy after this law went into force it was forced up to $1.85. In 1900 it was forced up to $1.92; in 1901 to $1.95; in 1902 to $2.08. So we are not left to speculation. Marion County is but a miniature State, and the operation of the law is no longer speculative. The inequalities of its operation have been plainly demonstrated; the rate has gone steadily up since the law was enacted, to the detriment of the owner of unincumbered realty. The law offers a premium for remaining in debt, and for placing and keeping that debt in the form of a mortgage debt.

We have plainly pointed out, in our brief, the persons "prejudiced thereby" and the inequalities of the law, and the minority opinion of the court, better than we have done it, demonstrates with remarkable clearness the unconstitutionality of the law and the disastrous results that must follow holding it constitutional, and how clearly it violates existing precedent and previous decisions.

It may be too much to affirm that laws "must at all times operate fairly, as applied to any individual," but it is not too much to expect that each and every law must "operate fairly" so far as the principles inherent in the law itself are concerned, and there, as the minority opinion shows, lies the distinction.

The very case cited by the court to sustain its opinion (C., C., C. & St. L. Ry. Co. v. Backus, Treasurer, 133 Ind. 513) condemns this law. It holds that "the provision of the State Constitution providing 'for a uniform and equal rate of assessment and taxation' is complied with

when the same basis of assessment is fixed for all property, and the same rate of taxation is fixed within the district subject to taxation." (Opinion, pp. 535-6.)

But this Act violates both propositions:

1st. As we have just shown above, the ratio is fifty per cent. in one case, three-tenths in another, and varying in each case under the law to fit the various conditions of the taxpayer's property, with no two cases exactly alike. Hence, a varying and ever changing ratio.

2d. The basis of assessment for realty not mortgaged is its fair, cash value, while this law provides, upon its face and by its terms, that "the valuation remaining after such deduction shall have been made shall form the basis for assessment and taxation." Thus making two bases for taxation of realty, instead of "one fixed basis" in the same taxing district. Each feature of the law violates one of the basic principles of the Constitution.

Exactly the same doctrine is announced in the other case between the same litigants, decided a few days later. (133 Ind. 625.)

Neither does it seem to us that there can be any conflict between the first and second clauses of Section 1, Article X, of the Constitution. The first prescribes a "uniform and equal rate of assessment and taxation." The second requires the Legislature to "prescribe such regulations as shall secure a just valuation for taxation of all property," etc. The first clause provides for uniformity and equality of rate in the district; the second relates only to honesty

and justice in the appraisement or valuation. The second permits no modification of the first. That is absolute. Uniformity and equality are absolutely necessary; they may not be wanting in a constitutional law. Yet both are wanting in this law.

The second clause relates only to the machinery for valuation for taxation; prohibits exemptions, except for the specified purposes, and authorizes the Legislature to prescribe such regulations for the control of the Assessor as shall secure a just valuation. One can not conceive any condition in which these two clauses could conflict. Uniformity and equality must be there. This means identical rate within the taxing district. Valuations, under the rate, must be just valuations, not discriminating between man and man, nor exempting or deducting as between one and another.

The court says, however, that "the regulations that the General Assembly are required to enact must look to the securing of a just assessment," etc. Not so! The court misquotes the law. The General Assembly can not prescribe anything of that kind. The first clause provides for this. The constitutional provision is not that the Legislature prescribe such regulations as shall secure a "just assessment," but the language of the constitutional provision is, "such regulations as shall secure a just valuation"—not just assessment. The assessment is provided for in the first clause, which requires uniformity and equality. The only thing that may vary is the valuation, not the assessment. The assessment must be equal and uniform. The valua-

tion may vary with men's judgment, or desires to favor one person or another, and the Legislature must prescribe regulations which shall prevent assessors from making anything but "just valuations," but it has no discretion as to the assessment.

This is just the error into which the court has fallen. It has confused "just assessments" with "just valuation." Valuations may be varied to meet justice and worth. The assessment, which is that made upon the valuation, may not be varied; it must be as provided by the first clause—uniform and equal. The court is confused in its mind by applying this adjective to the assessment instead of to the valuation. The constitutional provision permits only regulations for just valuations, not just assessments, for the assessment follows inevitably, under the uniform and equal rate clause, and can not be varied as between different persons. And this is the weakness of this law. It varies the rate, and not the valuation. These two things the court has, doubtless inadvertently, confused. It is not necessary to "subordinate the one requirement to the other." They do not clash, conflict nor cross one another. They do in the mind of the court, as this opinion shows, but that is because the court has confused assessment with valuation. The provision is not for just assessment, but "just valuation." The assessment follows necessarily, at the prescribed rate of the district, and can not be varied, under the Constitution. Fit these two provisions of this Section 1, Article X, into their places. Each fits; neither trespasses upon the other's place. Every word is given force

and meaning, and no conflict between them can arise. It is the court's interpretation that requires construction. Under our interpretation it needs none; it is plain; each provision supports the other, and neither overlaps, conflicts or interferes with the other.

We submit, in all fairness, that our interpretation is the correct one. Under our interpretation no occasion arises for the court to determine whether the General Assembly may provide for "the taxation of real estate according to the actual interest of the owner therein." No such license is permitted by the constitutional provision. The valuation must be the "just valuation" of the property, without reference to the interest of the owner. That takes care of itself. Under this provision of the Constitution there can be no other rule.

The court says:

> "Many cases uphold the right of a State to enact a law that apportions the value of land for taxation upon the basis of the actual interest of the mortgagor and mortgagee, respectively, therein."

We hope we may be pardoned if we say this is hardly a fair statement of the law. Let us state it. A few cases have upheld the right of a State to enact a law that apportions the value of land for taxation upon the basis of the actual interests of the mortgagor and mortgagee therein. But such cases have always been cases where the law taxes the mortgage as realty, at the situs of the land, which this Act of ours does not do. The court ignores, also, the de-

cided cases, which say that this may not be done, and is not the law where there is no law taxing the mortgage at the situs of the land, and making the mortgage realty, for the purposes of taxation. To those cases we called the court's attention in our brief, but the court passes these decisions by without notice in its opinion. We refer to the case of Holland v. Commrs. of Silver Bow County, reported in 27 L. R. A. 797. There the court decided four propositions:

1. That the State has no power to tax mortgages held by nonresidents at the locus of the mortgaged property;

2. That mortgage indebtedness held by a nonresident mortgagee must be taxed at his residence;

3. That a debt, for purposes of taxation, is situated at the domicile of the creditor; and

4. That in the absence of a law making the mortgage taxable at the situs of the land, the mortgage is taxable at the domicile of the creditor. That in the absence of a law like that of Oregon and Michigan the old and usual rule shown in the Indiana cases cited obtains.

We have no such law as Michigan and Oregon in Indiana, and the above rules, and cases cited thereto in our brief, show that in Indiana, where there is no law making mortgages realty for purposes of taxation, and making them assessable at the situs of the land, the old and usual rule applies. The necessary conclusion follows that mortgages can not be deducted from the value of lands, except where the mortgage is taxable at the situs of the land, as in Michigan and Oregon.

6. As the court refers to Florer, Treas., v. Sheridan, Admx., 137 Ind. 28, we must again call attention to the fact that that case was decided under a law not now on the statute books. Personal property, like notes, etc., is not taxable property, but the surplus, after deducting debts, is, by the statute, made taxable property. Here net value obtains, of course; there is no other way of interpreting the statute; but this is not the statute relative to realty at all. We have not stopped to discuss the Act as to personal property, for the reason that it is not involved in this cause, although we have our own views as to its constitutionality. It is true, Section 1, Article X, does not say "the gross amount of all notes, accounts and other choses in action shall be taxed." In truth, it does not mention notes, nor any other property specifically; it says, on "all property, both real and personal, excepting," etc., and then follow the exceptions. This does not mean net property, either, as the court seems to hold it to imply. There is thus no way to justify this Act except to hold that when this constitutional provision says "all property," it means, or may mean, "net value" of property after deducting $700 of mortgage lien. We do not see how it is possible to put any such construction upon a constitutional provision.

7. The court holds the law is not special. Whether or not this Act is special legislation has been so fully argued in this brief, and so clearly demonstrated in the opinion of the minority of the court, that it seems to us nothing further need be said on the question. If they are not convincing on the proposition, we do not see how we can make it plainer.

8. The court closes the majority opinion by saying that it has been suggested that the Act is invalid under the provisions of the Fourteenth Amendment to the Federal Constitution, but he is "not inclined to give further expression to our views upon this subject." He then proceeds, however, to say that, as "particularly applicable to this question * * * we quote," and then proceeds to set out a number of decisions from authorities in the Federal Court which seem to sustain the majority opinion, at least in the mind of the Court. To us the opinions cited only state general propositions, which all concede, and which nobody denies, but which are not applicable to the peculiarities of the present law. This law does, it seems to us

1. Abridge the privileges and immunities of citizens of the United States;

2. Deprive persons of property without due process of law; and

3. Deny to persons within the jurisdiction of Indiana the equal protection of the law.

It abridges the privileges and immunities of citizens, because, under this law, the privilege and immunity of being relieved of certain taxes is granted to one citizen and the other is excluded. It is an exemption from debt and taxation. To tax one person more, or another less, because the debt which is a lien upon his property is a mortgage debt, instead of any other or different kind of a lien, is to deprive the person who is without the purview of the law of his property without due process of law. In like manner such a law also denies to the person who is without the purview of the law the equal protection of the law.

It seems to us that the case of Gulf, Colorado & Santa Fe Ry. Co. v. Ellis, 165 U. S. 150, decides this whole question. There the question was one of attorney's fees, which the statute provided should be recovered in cases of stock killed, when the claim did not exceed fifty dollars. The court says:

> "The single question in this case is the constitutionality of the act allowing attorney's fees. The contention is that it operates to deprive the railroad companies of property without due process of law, and denies to them the equal protection of the law, in that it singles them out of all citizens and corporations and requires them to pay in certain cases attorney's fees to the parties successfully suing them, while it gives to them no like or corresponding benefit. Only against railroad companies is such exaction made, and only in certain cases." (Opinion, pp. 152-153.)

The Supreme Court of the State held the law valid. The opinion says:

> "It is simply a statute imposing a penalty upon railroad corporations for a failure to pay certain debts. No individuals are thus punished, and no other corporations. The act singles out a certain class of debtors and punishes them, when for like delinquencies it punishes no others. They are not treated as other debtors, or equally with other debtors. They can not appeal to the courts as other litigants under like conditions and with like protection. If litigation terminates adversely to them, they are mulcted in the attorney's fees of the suc-

> cessful plaintiff; if it terminates in their favor, they recover no attorney's fees. It is no sufficient answer to say that they are punished only when adjudged to be in the wrong. They do not enter the courts upon equal terms. They must pay attorney's fees if wrong; they do not recover any if right; while their adversaries recover if right and pay nothing if wrong. In the suits, therefore, to which they are parties they are discriminated against, and are not treated as others. They do not stand equal before the law. They do not receive its equal protection. All this is obvious from a mere inspection of the statute."

Continuing, the court says, on page 155 of the opinion, that while it is not within the scope of the Fourteenth Amendment to withhold from States the power of classification,

> "yet it is equally true that such classification can not be made arbitrarily. The State may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.

"As well said by Black, J., in State v. Loomis, 115 Mo. 307, 314, in which a statute making it a misdemeanor for any corporation engaged in manufacturing or mining to issue in payment of the wages of its employes any order, check, etc., payable otherwise than in lawful money of the United States, unless negotiable and redeemable at its face value in cash or in goods and supplies, at the option of the holder, at the store or other place of business of the corporation, was held class legislation and void: 'Classification for legislative purposes must have some reasonable basis upon which to stand. It must be evident that differences which would serve for a classification for some purposes furnish no reason whatever for a classification for legislative purposes. The differences which will support class legislation must be such as in the nature of things furnish a reasonable basis for separate laws and regulations. Thus, the Legislature may fix the age at which persons shall be deemed competent to contract for themselves, but no one will claim that competency to contract can be made to depend upon stature or color of the hair. Such a classification for such a purpose would be arbitrary and a piece of legislative despotism, and therefore not the law of the land.'"

We can not quote all of this opinion, but on this question of classification it is all very much in point, and we must ask the court to read it. It shows, clearly, how unlawful the classification in this exemption Act is. The court sums it all up in these pithy words:

> "But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this." (Opinion, p. 159.)

By this case we see that classification can not be made on the color of men, white or black; nor on the basis of the age of men; nor on the basis of the amount of wealth they possess, because these are distinctions which do not furnish any proper basis for the attempted classification. What is it, then, that makes mortgage indebtedness on realty alone, as distinguished from indebtedness with or without lien on realty, or personalty, a proper classification for deduction from taxation? To us it seems that a bare statement of the case shows, at once, that such a classification for exemption or deduction is not one contemplated by the Constitution.

The rule is plainly stated to be that the classification "must always rest upon some difference which bears a reasonable and just relation to the Act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis." The classification made by this law we have shown in our brief to be without any such basis, and a purely arbitrary one. What law can justify it?

Again, this opinion says: "The differences which will support class legislation must be such as in the nature of things furnish a reasonable basis for separate laws and regulations." What difference is there between debts secured by mortgage on realty, as distinguished from debts

secured by mortgage on personalty, or by liens of other description, either on realty or personalty, which naturally makes a class, so that the mortgage debt can be lawfully exempted from taxation. Certainly none.

This opinion further says (p. 154) that it is the duty of the courts to be watchful for the constitutional rights of the citizens against "any stealthy encroachments thereon," like this very law.

Upon this question of unlawful discrimination by this species of classification by the Legislature the recently decided cases of Thomas Connolly & William Dee v. The Union Sewer Pipe Co., decided by the Supreme Court of the United States March 10, 1902, are in point. The opinion is published in the Advance Sheets, No. 46.

The cases were the so-called "Trust Cases," involving the constitutionality of the Illinois trust law. The law is quoted in full in the opinion. Section 1 defines what shall be a trust. Section 9 provides that "the provisions of this Act shall not apply to agricultural products or live stock while in the hands of the producer or raiser." The point is made that this section was an unlawful discrimination, and rendered the law unconstitutional. This point the Supreme Court held to be well taken and declared the Illinois trust law unconstitutional on the ground of unlawful discrimination. The case is interesting. The discussion of this portion of the case is found upon pp. 10 to 20 of the opinion. The court says "the vital question is" whether the statute of Illinois violates the Fourteenth Amendment of the Constitution of the United States. The court says of the law (Opinion, p. 13):

> "Looking specially at its provisions, it will be seen that, so far as the statute is concerned, two or more agriculturists or two or more live stock raisers may, in respect of their products or live stock in hand, combine their capital, skill or acts for the purpose of creating or carrying out restrictions in the sale of such products or live stock," etc.

Then it is shown that the law excludes all other combinations. The court holds that this is discrimination and fatal to the law, and, discussing such arbitrary classification by the Legislature, says (Opinion, pp. 15-16):

> "The difficulty is not met by saying that, generally speaking, the State when enacting laws may, in its discretion, make a classification of persons, firms, corporations and associations in order to subserve public objects. For this court has held that classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. * * * But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. * * * No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government. * * * It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a clas-

> sification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection.' (Gulf, Colorado & Santa Fe Ry. v. Ellis, 165 U. S. 150, 155, 159, 160, 165.) These principles were recognized and applied in Cotting v. Kansas City Stock Yards Co., 183 U. S. 879, in which it was unanimously agreed that a statute of Kansas regulating the charges of a particular stock yards company in the State, but which exempted certain stock yards from its operation, was repugnant to the Fourteenth Amendment in that it denied to that company the equal protection of the laws."

Here the natural class is debtors. But the very title of the Act limits it to debtors owning realty incumbered by mortgage. These provisions have been so fully gone over in our brief that we need not again do more than call attention thereto.

A case much like the case at bar was decided in Pennsylvania, and the law was held unconstitutional. The Act provided a tax upon all persons, firms, associations or corporations employing foreign-born, unnaturalized male persons over twenty-one years of age within the commonwealth. The Act is in principle exactly like the one at bar. The court, in vigorous and appropriate English, holds the Act unconstitutional and a violation of the provisions of the Fourteenth Amendment.

> Frazer v. McConway & Torley Co., 82 Fed. R. 257 (259-60).

See also on these questions:

Railroad & Telephone Cos. v. Board, etc., 85 Fed. R. 302 (317-318);
Atchison, etc., R. R. Co. v. Matthews, 174 U. S. 96.

Uniformity in taxing implies equality in the burden of taxation, and this equality of burden can not exist without uniformity in the mode of assessment as well as in the rate of taxation.

Exchange Bank of Commerce v. Hines, 3 Ohio St. 1;
The Railroad Tax Cases, 13 Fed. R. 722 (735).

These railroad tax cases were decided upon this very mortgage deduction question, and the law was held unconstitutional because it did not permit the railroads to deduct their mortgage indebtedness. The cases are exactly in point on this law. The court says (Opinion, p. 736):

> "There is here a discrimination too palpable and gross to be questioned, and such is the nature of the discrimination made against the Southern Pacific Railroad Company in the taxation of its property."

It is an identical case with the one at bar. The whole opinion is much in point in this case. The opinion is too long and too elaborate to quote, and we must ask the court to read it.

The Railroad Tax Cases, 13 Fed. R., pp. 722 et seq.

"Where the organic law of a State had brought every citizen in the State into one constitutional class for the purpose of taxation, and has provided that taxes shall be assessed and levied on value as the only basis, it is not competent, under the form of classification, to divide up this class and thus violate the Constitution."

Nashville, C. & St. L. Ry. v. Taylor, 86 Fed. R. 168.

"It may be as well to say, in this connection, that it is now established that the constitutional requirement of uniformity in taxation applies to the mode of assessment as well as the rate of levy."

Railroad & Telephone Cos. v. Board, 85 Fed. R. 302 (307).

The whole opinion in the latter case is much in point, and clearly demonstrates that this law is unconstitutional.

We submit to the court that there is error in the decision of the Supreme Court of the State of Indiana, and that its ruling upon the questions involved should be reversed and this law declared unconstitutional.

Respectfully submitted,

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October 25, 1903.